No. 21698

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INDEPENDENT QUICK SILVER COMPANY,

APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF AND APPENDIX FOR THE APPELLANT

William B. Murray
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NATURE OF THE CASE

The mining claimant appeals from a summary judgment of the District Court for Oregon affirming a decision of an assistant solicitor for the Secretary of the Interior. The administrative decision made the surface resources of the Edith and Paymaster lode claims[1] subject to the limitations and restrictions of section 4 of the Act of July 23, 1955,[2] on the ground that the

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1/ The Twenty-two claims in controversy are listed in Exhibit "S" Appendix p. 102.

2/ 30 USC §613

mining claimant failed to make discovery of a valuable mineral deposit within the purview of the mining laws prior to that date, and that the markers showing the boundaries of the claims had not been maintained.

The administrative decision departs from the settled law with respect to mining titles. It disturbs the foundation upon which title to all located mining claims rests.

STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

The mining claimant filed a complaint seeking judicial review of the administrative proceeding which had been initiated by the Forest Service, United States Department of Agriculture, and heard and determined by the Department of the Interior.

The claimant alleged: It is a citizen of Oregon. Stewart L. Udall is the Secretary of the Interior of the United States. The mining claims are in Oregon. The amount in controversy exceeds $10,000. It had exhausted its administrative remedies. It charged that the Secretary was in error as a matter of law in listed particulars. R 1.

The Secretary moved for summary judgment based on the administrative file, marked exhibit 1, attached in support of his motion. This exhibit contains the administrative record, the exhibits and the transcript of the testimony before the Hearing Examiner. The court below allowed the Secretary's motion for summary judgment. R 143. The company filed a motion for reconsideration. R 144. The court denied the motion. R 382.

The appellant filed notice of appeal. R 164. Bond for cost on appeal.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The District Court of the United States had jurisdiction of this action under the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 USC §1009; the Act of June 25, 1948, as amended, 62 Stat. 964, 28 USC §§ 2201, 2202, whereby relief is provided by declaratory judgments; the Act of June 25, 1948, Ch. 646, 62 Stat. 930, 28 USC §1331, as amended, with respect to actions arising out of the Constitution and laws of the United States; the Act of October 5, 1962, 76 Stat. 744, 28 USC §1361, which authorizes action to compel an officer of the United States to perform his official duty with respect to real property; and the inherent power of the Court to grant injunctive relief in the premises.

JURISDICTION OF THE UNITED STATES COURT OF APPEALS

The jurisdiction of this honorable Court arises under 28 USC §1291.

QUESTIONS PRESENTED

1. Whether an administrative attempt to exercise power over mining claims under the Surface Resources Act is a nullity when there is an administrative failure to comply with the mandatory statutes as to the manner and circumstances under which agency power may be exercised.

2. Whether the discovery of 18,600 tons of cinnabar ore having an average value of 5.2 lbs. per ton of mercury and a total value in place in excess of $368,880 is a discovery within the meaning of the mining law.

3. Whether Government's evidence that mineral examiners, inexperienced with cinnabar, went on mining claims and sampled country rock on

one claim is substantial evidence to establish a prima facie case of lack of discovery on twenty-one claims not sampled.

4. Whether claimant forfeits title to a mining claim where boundary markers are obliterated or disappear as a result of passage of time or removal by other people.

5. Whether a hearing examiner is disqualified under the Administrative Procedure Act from hearing a case when he has signed a notice of hearing asserting the charges at the direction of the prosecuting agency.

STATUTES

Surface Resources Act - 30 USC §613 (a), (c), (e): Section 613 (a) sets out in detail the procedure designed to make §612 retroactive in its application to mining claims located prior to July 23, 1955, effective date of the act. Section 613 (a) grants power to forestry to initiate a proceeding to contest title to a mining claim. See Appendix p. 45.

Section 613 (c) grants power to Interior to hear and decide such controversies and requires that Interior shall follow its established practice with regard to contests or protests. See Appendix p. 47.

43 CFR §§221.51, 221.52,221.53, 221.58, 221.64, 221.68 provide for the filing of a complaint in contests and protests. See context of regulations in Appendix p. 48, 49, 50, 51.

Section 613 (e) provides that administrative failure to comply with requirements of sub-section (a) by failing to mail copy of published notice shall render proceedings wholly ineffectual. See Appendix p. 48.

Administrative Procedure Act 5 USC §1004 (c), 5 USC §1005 (b), 5 USC §1008 (a), 5 USC §1009 (c).

Section 1004 (c) provides that the hearing examiner shall not be subject to the supervision or the direction of any officer or agent engaged in the performance of investigative or prosecuting function for any agency. See Appendix p. 51.

Section 1005 (b) provides that no process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. See Appendix p. 52.

Section 1008 (a) provides that no sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law. See Appendix p. 52.

Section 1009 (c) provides that every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. See Appendix p. 52.

30 USC §§ 21,22, 26 relate to mineral lands and mining. See Appendix p. 53, 54.

30 USC §28 relates to mining district regulation by miners; etc, and provides that the location must be distinctly marked on the ground so that its boundries can be readily traced. The claim must be described by reference to some natural object or permanent monument as will identify the claim. See Appendix p. 53.

STATEMENT OF FACTS

The court below concluded that agency compliance with the statutory conditions upon which agency power depends was not necessary. It found that no complaint had been filed, no service of published notice had been made, and that no certificate of title accompanied the statutory request which initiated the proceedings. Nevertheless, the court upheld those proceedings. The opinion of the District Court is set out in the Appendix at page 116.

The Hearing Examiner determined that the discovery of 18,600 tons of cinnabar ore having an average value of 5.2 lbs. per ton of mercury was a discovery within the meaning of the mining law. He found that this deposit was on the Bonanza claim. The average value of a 76 pound flask of mercury in 1955 was $290.35 per flask. He determined that the Government's evidence was sufficient to establish a prima facie case as to the other twenty-one claims in controversy. The Government's mineral examiners, inexperienced with cinnabar, went on the mining claims and sampled country rock on one claim but did not take any samples on the remaining twenty-one claims. Admin. file, Ex. 1.

Both the mining claimant and the Government appealed from the Hearing Examiner's decision. The Secretary reversed the Examiner's finding that a mineral discovery had been made on the Bonanza claim. He rejected the evidence of mineral discovery shown by reports of mining engineers for the mining claimant and substituted as basis for the decision his own assumption that samples taken and assayed under the direction of George Hogg, mining engineer were not assayed in accordance with standard practice. The Secretary affirmed the examiner's determination that the Government had

established a prima facie case by substantial evidence.

The twenty-two lode claims in controversy were located between 1929 and 1932 for cinnabar, an ore for mercury. They are within the Ochoco Mining District in Crook County in Oregon. The names of each claim, the date recorded, names and witnesses, and book and page number where recorded are set forth in Exhibit "S", Appendix p. 101.

There is a record of mercury production in the area of some 1,400 flasks, Tr 7. Adjoining the twenty-two claims on the southwest is the Mbtherlode group of claims. A major mineralized fracture known as the Johnson Creek Fault has been identified as extending through the Mbtherlode group, the Independent group in issue, and on several other locations beyond these main groups. Recently the owners of the Mbtherlode claims have secured a loan from the Office of Mineral Exploration of the Department of the Interior for further work on their claims. Holt p. 2, Adm. file, Ex. 1.

A two or three hundred thousand dollar mill is on the Motherlode claims, and ores from the Independent claims could be processed in this mill, Tr 143. Approximately $100,000 has been spent on the claims in issue, $80,000 in cash and $20,000 in services, Tr 137.

WITNESS - CONSTESTANTS	DIRECT	GROSS	REDIRECT	RECROSS
Lloyd E. Holmgren	4	20	37	
Raymond F. Shirley	38	46	68	69
Henry G. Turner	70	71		

EXHIBITS	FOR IDENTIFICATION	IN EVIDENCE
1. Map made by Mr. Holmgren	9	13
2. Assay certificates of Government's samples IQ-1 through 10	19	19

Mr. Holmgren, for the contestant, went on the ground with Mr. Turner and Mr. Shirley, found a section corner, a permanent monument, and surveyed the boundaries of each claim and mapped them. Exhibit 1. His map is accurate as to the boundaries of the claims and each of them, but he was mistaken as to the location of some of the workings. His map of the boundaries of each claim is the same as Mr. Hogg's map of the boundaries of each claim. Exhibit G.

Mr. Loyd E. Holmgren said that he had no experience with cinnabar, Tr 37. The samples taken by him were taken in country rock, weathered basalt, and were not samples of cinnabar ore, Tr 22. Mr. Shirley took no samples and testified that his experience with cinnabar was incidental to the examination of uranium claims, Tr 48. Mr. Holmgren said that he was not qualified to interpret the map or the report about the claims at issue published by the U. S. Department of the Interior, Geological Survey (1949), Exhibits A and B. None of the Government's witnesses expressed an opinion as to whether a reasonably prudent man would be justified in spending time and money with a reasonable prospect of success in developing a valuable mine.

The contestant offered no rebuttal evidence. It did not deny nor offer any evidence to controvert the evidence given by George C. Hogg, a registered professional engineer, nor the evidence of H. F. Byram, registered Professional engineer, and that of Burton Westman, Geologist and Engineer. There is no least denial by any evidence of the reports received in evidence written by George C. Hogg (1930), Exhibit P, Appendix p. 88, Report of 1942, Exhibit I, Appendix p. 56, Report of 1955, Exhibit O, Appendix p. 87.

Nor did the contestant controvert the report by H. F. Byram (1932), Exhibit L, Appendix p. 82, Nor the reports by Burton J. Westman (1951) Exhibit V, Appendix p.104and report (1952) Exhibit W, Appendix p. 108.

No complaint was filed and no charge was asserted that there was a lack of discovery on each of the claims in controversy. Nor was there any charge asserted that the boundarieshad not been marked on each claim when it was located. There were no pleadings and the Government offered no proof as to each of the twenty-two claims separately. The Secretary said that the Government was not able to present evidence as to each of the twenty-two claims separately, R 291, and that it was not necessary for the Government to make out a prima facie case of lack of discovery as to each claim.

MINING CLAIMANT'S WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
George C. Hogg	76	115	118	
Lloyd L. Bartlett	123	138	141	
Robert W. Casebeer	143	164	174	
Joseph Enginger	176			
Lynn D. Johnson	181			
Alfred H. Mealey	185			

MINING CLAIMANT'S	FOR IDENTIFICATION	IN EVIDENCE
Ex. A. Preliminary Report of the Geophysical Survey of Part of the Johnson Creek Area, Ochoco Quicksilver District, Oregon, by G.D. Bath and K. L. Cook	30	65
Ex. B. Geophysical Map G.D. Bath and K. L. Cook	32	64
Ex. C. Map of Mineral Deposits of Oregon	63	64
Ex. D. Map showing general area Ochoco Quicksilver District	65	65
Ex. E. Map showing relationship of Mother Lode property to the Independent Mine	65	66

FINDINGS OF FACT

Requested Finding No. (1). That Independent Quick Silver Co. is the owner of 22 unpatented mining claims, named, located, and listed under "The Company's Property" above. Ruling: "Finding No. 1 is adopted."

Requested Finding No. (2). That Exhibit "G" attached hereto is a map of the claims, and the map correctly shows the boundaries thereof, and the names of each of the 22 claims referred to in requested finding No. (1). That said claim and plan map was prepared by George C. Hogg, registered professional mining engineer, April 29, 1940. Ruling: "Finding No. 2 is adopted. The accuracy of Exhibit G was assumed for the purpose of the decision."

MINING CLAIMANT'S	FOR IDENTIFICATION	IN EVIDENCE
Ex. F. Aerial photograph	74	75
Ex. G. Map prepared by Mr. Hogg	79	100
Ex. H. Map prepared by My. Hogg	81	100
Ex. I. Report by Mr. Hogg(some missing pages)	82	100
Ex. J. Report by Mr. Hogg(with missing pages in Exhibit I)	83	100
Ex. K. Longitudinal section showing area calculated as probable ore, 18,600 tons.	84	100
Ex. L. Report by H. F. Byram, Nov. 6, 1932	85	131
Ex. M. Copy of map included in I on larger scale	88	101
Ex. N. Copy of map included in I on larger scale	88	101
Ex. O. Mr. Hogg's supplementary report, June 29, 1955, on examination made in 1942	102	106
Ex. P. Mr. Hogg's preliminary report, 1930	102	102
Ex. Q. Drill hole logs	106	109
Ex. R. Resume of assays - Burton Westman	124	127
Ex. S. Record of claims with book and page no.	127	128
Ex. T. Report by H. F. Byram, Nov. 6, 1932, as being a part of Exhibit V	128	134excluded
Ex. U. Records of drill holes 1 through 4 on the Bonanza	130	132
Ex. V. Report by Burton J. Westman, Oct. 11,1951	132	133
Ex. W. Report by Burton J. Westman, 1952	132	134
Ex. X-1 to X-23. Photographs	143	160

Requested Finding No. (3). The Contestant has not offered evidence of sampling, nor any substantial factual evidence, pertaining to each of said 22 claims with respect to the quantity and quality of minerals thereon, and therefore has not made a prima facie case as to each of the claims challenged. Ruling: "Finding No. 3 is denied for the reasons set forth in the decision."

Requested Finding No. (4). George C. Hogg, is a registered professional mining engineer, licensed by the State of Oregon to practice mining engineering in the State. He was formerly Chief engineer for Senator Clarke of Montana, (Fabulous Copper King). From June, 1939 to May, 1940, Mr. Hogg was employed by Independent Quick Silver Co. to study the mine, and in May, 1940 wrote a report to the company concerning the history and development of the property and the work done on the property. Exhibits "I" and "J"." Ruling: "Finding No. 4 is adopted."

Requested Finding No. (5). Separate Findings are specifically requested concerning the facts reported in 1940 by Mr. Hogg.

(A) "Geology and Ore Genesis", pp. 3-6, Exhibit "J".

(B) "History and Development", p. 14 to and including the fourth full paragraph on p. 15, Exhibit "J".

(C) Report of work accomplished under Mr. Hogg's supervision from June, 1937 to May, 1940, commencing last full paragraph on p. 15, to and including p. 21, Exhibit "J", and including facts with respect to cuts "A" to "G" inclusive on Bonanza, Happy Chance and New Era; totalling 2600 ft. excavating 7650 cubic yards, including 1498.7 ft. of drill holes, and 245 ft. of trenching on the Green Back claim and sampling results thereof.

(D) That the samples were taken five foot intervals as reported by Mr. Hogg under "Sampling" on p. 23, Exhibit "J".

(E) That "Ore Reserves" were developed as reported on p. 23, Exhibit "J". Specifically a block of ore $\frac{155 \times 18 \times 80}{12}$ = 18,600 tons of 5.2 lbs. per ton, p. 24, Exhibit "J".

(F) Judicial notice should be taken that at the effective date of the "Multiple Use Act", the mercury market was $325.00 per 76 lb. flask. Thus the block of ore at that time had a value in excess of $386,880.00.

(G) That Mr. Hogg recommended specific work to be done on the property in accordance with "Recommended Development", p. 22, Exhibit "J", totalling $25,000.00 to develop additional ore, inasmuch as the ore already developed would be sufficient only for one years operation for a 50 ton reduction plant. Ruling: "Finding No. 5 is adopted except that the average value of mercury in 1955 was $290.35 per flask. There was no evidence at the hearing that the value of mercury on July 23, 1955 was $325 per flask."

Requested Finding No. (6). Separate Findings are specifically requested with respect to the facts stated in the "Resume of Assays", Exhibit "R", Tr. 124, listing the date samples were taken, the location of the samples, laboratory numbers, names of assayer, per cent of mercury, and pounds per ton, approximately 291 samples and assays complied by Burton J. Westman, B.Sc., geologist, with respect to the Independent Quick Silver Mine. Ruling: "Finding No. 6 is denied. There was insufficient foundation to support Exhibit R."

Requested Finding No. (7). Separate findings with respect to the faulting pattern, and directions of each pattern, intersecting faults, dikes,

and igneous intrusions concerning the Independent Quick Silver Mine.

(A) As stated in the reports of Burton J. Westman, B.Sc., geologist, of October 11, 1951, and November 25, 1952.

(B) As stated in the report of C. D. Bath and K. L. Cook. Preliminary Report on a Geophysical Survey of a Part of the Johnson Creek area, Ochoco Quick Silver District, Oregon, published by U.S.G.S., 1949, concerning geological structure of the Independent Quick Silver Mine, and

(C) As stated by H. F. Byram, mining engineer (R.F.C.) in his report of November 9, 1932. Ruling: "Finding No. 7 is adopted to the extent that the facts are recited in the decision."

Requested Finding No. (8). That the photographs, Exhibits X1 to X23 inclusive, are correct and true views of certain workings photographed on the claims in question, as explained by Robert W. Casebeer. (Tr. 143-164) Ruling: "Finding No. 8 is adopted."

Requested Finding No. (9). That the "Drill logs", Exhibit "G", Tr. 106, 109, are a correct record of the results of drilling at the places to the depth with the results as shown by said Exhibit and maps. Plates I through V accompanying Mr. Hogg's report of May, 1940, Exhibit "J". Ruling: "Finding No. 9 is adopted except that the drill logs are in Exhibit Q and there is no plate 1 with Exhibit J.

Requested Finding No. (10). That the Department of the Interior, Office of Minerals Exploration, has entered into an $80,000.00 exploration contract with Pacific Minerals and Chemical Co., Inc., to explore the same structure veins extending into the Mother Lode Mine from the Independent

Mine to the South (Tr. 34). Ruling: "Finding No. 10 is adopted as amended to read that the Office of Mineral Exploration has loaned money for the exploration of the Mother Lode property."

Requested Finding No. (11). That Lloyd E. Holmgren, mining engineer for the government, has not had any experience with Cinnabar or in operating a Cinnabar mine, Tr. 21. All ten samples taken by the government were in Basalt, not in the Clarno or Ochoco formations, Exhibit "2", Tr. 22. (Shirley Tr. 54). Ruling: "Finding No. 11 is adopted."

Requested Finding No. (12). Mr. Holmgren testified that the claims were south of the Section Marker (corner point, Sec. 16, 17, 20, 21) Tr. 11, Mr. Shirley testified the same section marker was north of the claims, Tr. 47. Ruling: "Finding No. 12 is incorrectly worded. Mr. Holmgren testified that the section corner was south of the claims not that the claims were south of the corner. Mr. Shirley testified that the corner was northeast of the claims."

Requested Finding No. (13). Mr. Holmgren testified that Mr. Casebeer was with him when samples were taken over a period of three days. Tr. 14, 20. Mr. Shirley testified that Mr. Casebeer spent one day and a fraction of the next day when samples were taken. Tr. 427. Mr. Casebeer was on the property less than one hour. Stated he had maps, drill logs, and records available, and would be glad to show them, if requested. No request was made. He left the property, Tr. 145. Ruling: "Finding No. 13 is adopted to the extent that the facts are recited in the decision.

Requested Finding No. (14). That Mr. Bartlett told Mr. Holmgren and Mr. Shirley, "we had information we would be glad to give them and also if

they went up to make an examination we would like to know so we could have someone, who knew something about the property could be there, and requested that they notify me. Q - and did they ever notify you? A - No. Mr. Reed had nothing to do with the Mine or the company. Q - Did you ever see Mr. Holmgren and Mr. Shirley up at the property at all? A - No, I did not. Q - You never did." (Tr. 136). Ruling: "Finding No. 14 is adopted although it is not an accurate quotation."

SPECIFICATIONS OF ERROR

We will prove our case by showing that the District Court erred as a matter of law in allowing the Secretary's motion for summary judgment and affirming the administrative decision.

1) Since the Surface Resources Act makes mandatory, under §613 (c) that a complaint be filed stating the facts constituting the grounds of contest, the court below erred in holding that no complaint was necessary.

2) Since the court below found that a copy of the published notice had not been served on the mining claimant as required by §613 (a), the court erred by failing to hold that the publication was a nullity under §613 (e) and to reverse the Secretary for his failure to exercise administrative power in accordance with the statute upon which that power depends.

3) Since the court below found that no certificate of title accompanied the statutory request initiating the proceeding under §613 (a), it erred in failing to hold the proceeding a nullity and to reverse the Secretary for non-compliance with the statute upon which his power depends.

4) Since the facts show that a block of 18,600 tons of cinnabar ore was discovered on the Bonanza , such cannot be disregarded on the pretext that evidence of assays was hearsay , nor by the substitution of agency assumption for evidence that the assays were taken in accordance with standard practice, and the court below erred by its failure to correct these administrative errors.

5) Since the contestant did not plead nor prove a prima facie case by substantial evidence as to each of the claims contested, the court below should have corrected this administrative error in failing to dismiss the case, at least as to twenty-one claims which were not sampled.

6) Since the contestant did not plead and prove that the boundaries of each of the claims had not been marked when located in 1929-1932, the absence of markers through no fault of claimant in 1962, does not cause a forfeiture of the claims, and the court erred in failing to correct this administrative error.

7) Since the hearing examiner signed a notice of hearing asserting the charges at the direction of the prosecuting agency the court below failed to correct the administrative decision holding that the examiner was not disqualified under the Administrative Procedure Act, 5 USC §1004(c).

1/ The District Court's opinion of September 14, 1966, is set forth in full in Appendix p. 116.

2/ The District Court's opinion of November 30, 1966, denying motion for new trial is set forth in full in Appendix p. 139.

SUMMARY OF THE ARGUMENT

The District Court erred as a matter of law in allowing the Secretary's motion for summary judgment and affirming the administrative decision.

The first three specifications of error concern the exercise of agency power where the agency has failed to comply with the conditions of the statute which created that power. We are concerned with agency noncompliance with the condition upon which agency jurisdiction over the subject matter is made to depend. We are not concerned with jurisdiction over the person.

The fourth specification concerns the application of the law of mineral discovery to the established facts, the rejection of assays as hearsay and assumption contrary to the established evidence. The fifth contends that the contestant did not plead nor prove a prima facie case as to each claim concerning claims which were not sampled. The sixth concerns contestant's failure to plead and prove that the boundaries of each of the claims had not been marked. The seventh concerns the qualification of the hearing examiner, who asserted charges at the direction of the prosecuting agency, to hear the case under the Administrative Procedure Act, 5 USC §1004 (c).

1. The court below found that no complaint was filed and concluded that none was necessary. The Surface Resources Act, 30 USC 612, amends the mining law. It makes mining claims subject to the rights of the Government, its permittees and agencies to use the surface of mining claims, and §613 (a), sets out in detail, the procedure designed to make §612 retroactive in its application to mining claims located prior to July 23, 1955 effective date of the Act.

Section 613 (a) grants power to Forestry to initiate a proceeding to determine title to mining claims. Section 613 (c) grants power to Interior to hear and decide such controversies and requires that Interior shall follow its established practice with regard to contests or protests. The established practice requires the filing of a complaint setting forth a statement in clear and concise lanquage of the facts constituting the grounds of contest. 43 C.F.R. 221.54.

The notice published under §613 (a) is not a complaint because it does not state facts constituting the grounds of contest. It requires the mining claimant to state the date, book and page where recorded, legal description of his claim, and whether he is a locator or a purchaser. R 320.

The Administrative Procedure Act makes mandatory that no process shall be enforced in any manner except as authorized by law. 5 USCA 1005 (b), 1008 (a). Agency power must be invoked in the manner provided by statute. Unless agency power is exercised strictly according to the procedures fixed by the statute granting the power, the action is a nullity.

2. The court below found that a copy of the published notice had not been served on the mining claimant as required by §613 (a). The court erred by failing to hold that such publication was a nullity under §613 (e), which provides that failure to serve a copy of the publication renders the proceeding wholly ineffectual. Such failure was agency noncompliance with a mandatory statute.

3. The court below found that no certificate of title accompanied the statutory request initiating the proceeding under §613 (a). The court erred by

failing to hold that the proceeding was a nullity and to reverse the Secretary for noncompliance with the statute upon which his power depends.

A certificate that there are "no tract indexes", R 318, is no substitute for a "certificate of title" prescribed by §613 (a).

It is impossible to reconcile the certificate of the attorney for Forestry that there are no tract indexes, R 318, with the affidavit of Mary Belle Raymond, R 310, that she mailed a notice to each of the mining claimants whose name and address is set forth in the certificate of examination of tract indexes relating to lands described in the published notice.

The legislative history shows that Congress intended to set up technical procedural safeguards to protect bona fide mining claimants against harrassment by administrative agencies. U.S. Code, Cong. and Adm. News, 84th Congress 1st Session, 1955, Vo.. 2, p. 2479.

4. The hearing examiner found that there was a block of ore containing 18,600 tons of cinnabar which assayed 5.2 lbs. per ton of mercury. The price of mercury during 1955 was $290.35 per flask. There are 76 pounds of mercury in a flask. Thus the ore in place on the Bonanza had a value in excess of $368,880 at the 1955 price. This ore already developed would be sufficient for one year's operation for fifty ton reduction plant. The examiner held that this was a discovery as a matter of law on the Bonanza claim. The Secretary reversed. See p. 12 of this Brief.

The hearing examiner found that the assaying and sampling procedures followed by Mr. Hogg were in accordance with good professional practice. See p. 12 of this Brief. Exhibit J, p. 23. Mr. Hogg's testimony was not

hearsay. He said that his sworn testimony here would be the same as written in his report, Exhibit J of Appendix p.56. He described the method of sampling under "sampling" in Exhibit J of Appendix p.79. The assaying was done under Mr. Hogg's personal direction. He and Mr. Champion would pan their samples and compare results and then they would have check assays made with the Montana Assay Office. It was possible to pan the mineral within a very accurate degree. For practical purposes it was just as accurate as assaying. It was the standard practice in checking cinnabar, Tr 109-110. No evidence was offered to contradict or deny this testimony. No rebuttal was offered. But the Secretary substituted his assumption to the contrary. The court below erred in failing to correct the agency ruling.

5. The contestant did not plead nor prove a prima facie case by substantial evidence as to each of the claims contested. Twenty-two claims were contested. Each claim is a separate case and is the unit for investigation. The Secretary said that the Government was not able to present evidence as to each of the twenty-two claims separately, R 291, and that it was not necessary for the Government to make out a prima facie case of lack of discovery as to each claim. There was no complaint nor any charge alleging want of discovery as to each claim. The claimant had the right to know what its opponent claimed and contended. Was the inquiry to be directed to whether a discovery had been made on the twenty-two claims as a group or as to each claim comprising the group? The right to know means the right to a meaningful hearing with the awareness of what matters must be countered. Gonzales v. United States, 348 US 407, 99 L ed. 467, 75 S Ct. 409. Congress in

providing for a hearing did not intend for it to be conducted on the level of a game of Blind Man's Buff. Simmons v. United States, 348 US 397, 99 L ed 453, 75 S Ct 397.

The contestant did not prove a prima facie case by substantial evidence. The Government's evidence that mineral examiners, inexperienced with cinnabar, went on the mining claims and sampled country rock on one claim is not substantial evidence to establish a prima facie case of lack of discovery on the twenty-one claims not sampled. Tr 37, 22.

6. The contestant did not plead and prove that the boundaries of each of the claims had not been marked when located in 1929-1932. The absence of markers through no fault of claimant in 1962 does not cause a forfeiture of the claims.

There is no pleading alleging, no proof establishing, that the claims were not marked when located. But the contention is made that the failure to maintain the markers in 1962 when the claims were visited by the Government examiners caused a forfeiture of the claims.

A location requires two acts: a discovery and a marking of the boundaries. Cole v. Ralph (1929) 252 US 286, 296. When the discovery is made and the boundaries are marked the locator's right to the ground embraced within his claim is vested. His rights are not divested if his markers are obliterated or disappear, whether their loss is a result of the passage of time or their removal by other people.[1]

1/ Bender v. Lamb, 133 Cal. App 348, 24 P 2d 208, Cert. Den. 291 U.S. 662; Walton v. Wild Goose Mining & Trading Co., 123 Fed. 209, 218, (9 Cir 1903) Cert. Den. 194 U.S. 631 (1904); Larned v. Dawson, 90 F. Supp 14 (D. Alaska 1950).

7. The charge of want of discovery was asserted by the hearing examiner over his signature at the direction of Forestry, the prosecuting agency. The court below erred by failing to hold that the mining claimant's motion for change of hearing examiner should have been allowed under the Administrative Procedure Act. A hearing examiner is disqualified from hearing a case if he acts at the direction of an agency engaged in the performance of investigating or prosecuting functions. Forestry was so engaged and the examiner acted at the direction of the agency. 5 USC 1004 (c).

ARGUMENT

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ALLOWING THE SECRETARY'S MOTION FOR SUMMARY JUDGMENT AND AFFIRMING THE ADMINISTRATIVE DECISION.

The Surface Resources Act, Public Law 167, was enacted July 23, 1955, 69 Stat. 368, 30 USC 612, 613, (Supp. 1965).

Section 612 makes unpatented mining claims located after July 23, 1955, subject to the Government's right to manage surface resources and to manage and dispose of vegetative resources, except mineral deposits subject to location under the mineral laws of the United States. And, it makes the claims subject to the right of the United States, its permitees and agencies, to use so much of the surface thereof for such purposes or for access to adjacent lands.

Section 613 (a) sets out a detailed procedure designed to make §612 retroactive in its application to mining claims located prior to July 23, 1955, as to claims alleged to be invalid. The head of any agency responsible for

administering lands of the United States may initiate a proceeding for determination of the surface rights of lands he is charged with administering.

Section 613 (c) provides that after the prosecuting agency has complied with the provisions of section (a), the Secretary of the Interior shall have power to hear the case and make a determination of the facts in accordance with the procedures then established by the Department of the Interior in respect to contests or protests affecting public lands of the United States.

There is no presumption of lawful exercise of authority enjoyed by administrative agencies. Jurisdiction of the subject matter by administrative agencies must be pleaded and proved. Phillips v. Fidalgo Island Packing Co., 230 F 2d 638, 16 Alaska 12, Rehearing denied 238 F 2d 234, 16 Alaska 338, Cert. den. 77 S Ct. 262, 352 U.S. 944, 1 Led. 2d 237, 16 Alaska 561.

The powers of inferior courts and administrative agencies created by Congress are confined to those bestowed by Congress. Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F 2d 589, (CCA 7 1945). Expertise possessed by an administrative agency does not empower the agency to rewrite the laws which it has been charged with enforcing. Atlanta Trading Corp. v. Federal Trade Commission, 258 F 2d 365 (CA 2 1958). And Administrative powers cannot be created by the courts in the proper exercise of their judicial functions. Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S. Ct. 587.

We are concerned here with the exercise of agency power in accordance with the conditions of the statutes which created that power. We are not concerned with jurisdiction over the person but with agency noncompliance

with the conditions upon agency jurisdiction over the subject matter is made to depend.

I

SINCE THE SURFACE RESOURCES ACT MAKES MANDATORY, UNDER §613(c) THAT A COMPLAINT BE FILED STATING THE FACTS CONSTITUTING THE GROUNDS OF CONTEST, THE COURT BELOW ERRED IN HOLDING THAT NO COMPLAINT WAS NECESSARY.

The power of the Secretary of the Interior to hear cases and determine them under §613 (c) is made to depend upon the Secretary's compliance with the provisions of the statute which creates that power. Section 613 (c) requires that: "The procedures with respect to notice of such a hearing and the conduct thereof...shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States".

The legislative history makes clear that the Department of the Interior is required to follow established procedures with respect to contests or protests affecting public lands. Report No. 730 of the House Committee on Interior and Insular Affairs, emphasizes this point as follows:

> "Such hearing would, under the bill, follow the established procedures and rules of practice of the Department of the Interior with respect to contests or protests affecting public lands." U. S. Code, Cong. and Admin. News, 84th Congress, 1st Session 1955, Vol. 2, p. 2485. (Emphasis supplied)

The established rules of the Department of the Interior require that an initiation of a contest must be by complaint. (Part 221) 43 CFR 221.63. The Complaint shall contain "a statement in clear and concise language of the facts constituting the grounds of contest". 43 CFR 221.54. By the use of the

word "shall", the act makes mandatory that the then established rules of procedure of the Department as to contest proceedings be followed in cases brought under the act.

Section 221.63 - Initiation of Contest. This regulation requires that initiation of a contest must be by a complaint, which must be filed in the Land Office, or if none, in the office of the Director, Bureau of Land Management, Washington, D. C.

Section 221.54 - Contents of Complaint. This regulation requires that the complaint shall contain certain information and shall be under oath. It requires "a statement in clear and concise language of the facts constituting the grounds of contest". (Emphasis supplied)

Section 221.68 - Proceedings in Government Contests. This regulation requires that "The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests.

The notice published under §613 (a) cannot function as a complaint since it does not contain "a statement in clear and concise language of the facts constituting the grounds of contest". (Emphasis supplied). The publication did nothing more than to request mining claimants to file the following information: 1. the date of their mining locations, 2. book and page where notice is recorded, 3. sections in which claims are situated, 4. whether claimant is locator or purchaser, 5. name and address of claimant and persons having interest in the claim. R 320.

The Department's practice of long standing requires a complaint to be

filed in a protest or a contest proceeding. Five cases in the record illustrate this established practice. In United States v. Eleanor A. Gray et al, (1960) Contests Nos. 0-239 to 0-255 inclusive, mineral applications nos. 03034 to 03050 inclusive, it can be seen that the proceedings were initiated by complaints setting forth the grounds of contest. R 188 . In United States v. Caldwell et al, Contest No. 146 Oregon (1958) a complaint was served upon the contestees setting forth the grounds of contest. R 179. Likewise, charges were made by complaint setting forth the grounds of contest in United States v. Edwards, (1957), Contest No. 166 Oregon, R 172 , United States v. Santiam Copper Mines, Inc., (1957) Contest No. 171 Oregon, mineral application No. 02928. R 335., United States v. Woodard, (1957) Oregon Contests 172 and 173, patent applications 03092 and 03093. R 328.

We have found no case involving protests and contests where a complaint has not been filed. There should be no departure from the established practice in cases under the Surface Resources Act for Congress has said the procedures before the Interior shall be the same.

The Administrative Procedure Act, makes mandatory that no process shall be enforced in any manner or for any purpose except as authorized by law. The act provides: "No process, requirement of a report, inspection or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law". 5 USCA § 1005 (b). And 1008 (a) of the act provides: "No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law." (Emphasis supplied)

The Administrative Procedure Act must be read as a part of every Congressional delegation of authority, unless specifically excepted. Hotch v. United States, 212 F 2d 280. And in Wong Yang Sung v. McGrath, 339 US 33, 94 L ed 616, 70 S. Ct. 445, it was held that proceedings to which the act applies must conform to the procedural safeguards enacted by the act if resulting orders are to have validity.

An Administrative Agency is a tribunal of limited jurisdiction which may exercise only the powers granted by statute reposing power in it. Pentheny Limited v. Government of Virgin Islands, 360 F 2 786 (CA Vir. Islands) 1966. And when Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. Stark v. Wickard, 64 S. Ct. 559, 321 US 288, 88 L ed 733 (US App. D. C. 1944).

The power of an administrative officer is limited to carrying out a law according to its terms. Fidalgo Island Packing Co. v. Phillips, 120 F. Supp 777, Aff. 230 F 2 638, rehearing denied 238 F 2 234, Cert. denied 77 S. Ct. 262, 352 US 944, 1 L ed 2 237. Hence an attempted investigation by an agency lacking legal sanction has no better standing than an interloper. McMann v. S. E. C. (CA 2) 87 F 2d 377, 109 ALR 1445, cert den. 301 U.S. 684, 81 L ed 1342, 57 S Ct. 785; Railroad Comm. v. Horesta Natural Gas, 166 SW 2d 117.

Therefore, since § 613 (c) makes mandatory that a complaint be filed setting forth the facts constituting the grounds of contest, and the Administrative Procedure Act makes mandatory agency compliance with the procedural

requirement of the statute, we respectfully submit that the court below erred in holding that "the use of a complaint is averted by the publication requirements of the statute". Appendix P 132.

II

SINCE THE COURT BELOW FOUND THAT A COPY OF THE PUBLISHED NOTICE HAD NOT BEEN SERVED ON THE MINING CLAIMANT, AS REQUIRED BY §613 (a), THE COURT ERRED BY FAILING TO HOLD THAT THE PUBLICATION WAS A NULLITY UNDER §613 (e), AND TO REVERSE THE SECRETARY FOR HIS FAILURE TO EXERCISE ADMINISTRATIVE POWER IN ACCORDANCE WITH THE STATUTE UPON WHICH THAT POWER DEPENDS.

The court below found that "a copy of the publication was not served on the mining claimant as demanded by the statute. Appendix P 132.

§613 (a) provides that:

> "Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an affidavit filed asforesaid, and shall cause a copy of such notice to be mailed by registered mail to each person whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed and affidavit showing that copies have been so delivered or mailed." (Italics supplied)

§613 (e) provides:

> "If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person." (Italics supplied)

Unless the requirements of § 613 (a) are complied with, then the Secretary of the Interior has no authority to conduct any hearing or take any procedure with respect to determining the validity of any mining claim under this Act.

The Act makes mandatory that the prosecuting agency "shall" cause a copy of the publication to be mailed to persons listed in a certificate of title accompanying its statutory letter to the Department of the Interior 30 USC § 613 (a).

It would seem clear that Congress intended that failure to comply with this statutory condition would render the attempted publication a nullity. The legislative history is as follows:

> "Subsection (e) of Section 5 provides that the publication of notice shall be wholly ineffectual as to any person entitled to be served with, or to be mailed a copy of the published notice, if the notice is not in fact so served upon or mailed to him." U. S. Code, Cong. and Adm. News. 84th Congress 1st Session, 1955, Vol. 2 p. 2486.

An attempt to exercise power without compliance with the provisions of the Act as to the manner and circumstances of its exercise is a nullity. 5 USC 1008 (a). Statutory administrative agencies are governed strictly by the statutes from which they derive their existence. N.L.R.B. v. Atlantic Metallic Casket Co., 205 F 2d 931 (CA 5 1950).

Therefore, having found agency non-compliance with the statute, under which the proceeding was brought, the court erred by failing to hold that such attempted exercise of power was a nullity.

III

SINCE THE COURT BELOW FOUND THAT NO CERTIFICATE OF TITLE ACCOMPANIED THE STATUTORY REQUEST INITIATING THE PROCEEDING UNDER § 613 (a), IT ERRED IN FAILING TO HOLD THE PROCEEDING A NULLITY AND TO REVERSE THE SECRETARY FOR NON-COMPLIANCE WITH THE STATUTE UPON WHICH HIS POWER DEPENDS.

In its opinion, the court below found another instance where administrative power had not been exercised in the manner commanded by the statute. The court said: "No request for publication was accompanied by the required certificate of title or abstract of title. Here the plaintiffs are technically correct..." Appendix P 132.

A certificate of title is required to accompany the statutory letter initiating the proceeding. The title certificate of an attorney for the Department is sufficient, if it is based on tract indices of mining claims in the county records. If there are no tract indices, the certificate of title must be prepared by a title or abstract company or title abstractor. 30 USC § 613 (a)

The legislative history shows that Congress intended to make a title search mandatory.

> "...a copy of the notice must be mailed by registered mail to each person who is shown by a title search to have an interest in the lands." U.S.Code, Cong. and Admin. News, 84th Cong. 1st Session, 1955, Vol 2, p. 2485. (Emphasis supplied)

A "Certificate of non-existence of tract indexes" R 318 is no substitute for a "certificate of title" under 30 USC § 613 (a).

It is impossible to reconcile the certificate of the attorney for Forestry that there are no tract indexes R 318 with the affidavit of Mary Belle

Raymond R 310 that she mailed a notice to each of the mining claimants" ... whose name and address is set forth in the certificate of examination of tract indexes relating to land described in said notice".

Congress undoubtedly had in mind the protection of bona fide claimants when it spelled out in the act the procedures to be followed. On the one hand, it wanted to invalidate fraudulent claims; on the other, it recognized that bona fide claimants would suffer from agency harrassment. The legislative history is recorded as follows:

> "On the other hand, continual interference by Federal agencies in an effort to overcome this difficulty would hamper and discourage the development of our mineral resources, development which has been encouraged and promoted by Federal mining law since shortly after 1800." U.S. Code, Cong. and Admin. News, 84th Congress, 1st Session, 1955, Vol. 2, p. 2479.

In its effort to protect bona fide mining claimants, Congress must have had in mind the effect of § 612 (c), which prohibits a miner from severing, removing or using surface resources subject to the management of the United States, and that of § 612, which prohibits the Government from "material interference with mining". What to the Secretary is not a material interference can be and often is to a miner a substantial interference, which as a practical matter, often does prevent him from mining.

The intention of Congress is defeated and the statute becomes meaningless if one by one technical safeguards commanded by the mandatory "shall" are disregarded. Lifting limitations on administrative power might very well result in its abuse. Agency power enforcing its edicts is not law when it transcends the limits of a lawful authority, even when acting in the

name and wielding the force of the government. Hurtado v. California, 110 U.S. 516, (1884).

Therefore, since a certificate of title, showing the names of the mining claimants was a mandatory requirement of the Statute, the department's view that no title certificate was necessary should be corrected.

IV

SINCE THE FACTS SHOW THAT A BLOCK OF 18,600 TONS OF CINNABAR ORE WAS DISCOVERED ON THE BONANZA, SUCH CANNOT BE DISREGARDED ON THE PRETEXT THAT EVIDENCE OF ASSAYS WAS HEARSAY, NOR BY THE SUBSTITUTION OF AGENCY ASSUMPTION FOR EVIDENCE THAT THE ASSAYS WERE TAKEN IN ACCORDANCE WITH STANDARD PRACTICE, AND THE COURT BELOW ERRED BY ITS FAILURE TO CORRECT THESE ADMINISTRATIVE ERRORS.

The court below said in its opinion that, "the testimony of a Mr. Hogg, on which the hearing examiner relied, was hearsay". Appendix p. 136.

Mr. Hogg testified in person at the trial: Tr 82-83

Q. (By Mr. Murray) I'll hand you Mining Claimant's Exhibit I, which purports to be a report written July 20th, 1940. Have you read this report?

A. Yes, I've read it, and I was up there at the time.

Q. And this is your report that you wrote at the time, is that correct?

....

Q. Now, did you prepare the maps which are a part of this report?

A. Yes.

Q. And are those based upon actual surveys and samples on the ground?

A. Yes.

Q. And your sworn testimony here would be the same as written in this report?

A. Absolutely, except that I think there's a few pages that are missing. (Exhibit "J" supplied missing pages in Exhibit "I")

Mr. Hogg's testimony about sampling is stated in Exhibits "J" and "I" as follows:

> Samples were taken in the dozer cuts A, C, F and G, by cutting a trench 2 to 3 inches in width and depth, respectively, in the center of the bottom of the cut, at 5 foot intervals. In Cut D, the trenches were cut across and up and down the cut at the same intervals. The location and values of samples taken are shown on Plates 2 and 5. These samples were panned, and values listed are panning estimates. Check assays were made frequently to ascertain and assure accuracy of these pannings.
>
> In sampling the drill-holes, the wash water or sludge was saved and combined with the cuttings recovered in the upside down core barrel; the samples thus obtained from each run were panned to determine the value of the material passed through.
>
> The lengths of the runs vary and the location and values of samples taken are shown on Plates 3 and 4. Portions of some of the sludge samples have been bottled and kept to be assayed. The core recovered has been carefully arranged in core-boxes and racked for future reference. Appendix p. 77.

Mr. Hogg testified further about the samples: Tr 109-110.

Q. (By Mr. Murray) Now, with reference to this panning that was done, is it possible to pan this quicksilver after taking many assays and knowing the rock, to pan it within a very accurate degree?

A. Yes.

Q. It is?

A. Yes, sir.

Q. Just as accurate as assaying?

A. Well, I won't say that, but, for all practical purposes, yes.

Q. And that knowledge comes after having many assays run and checking it against the panning results?

A. Very often --

Q. Is that correct?

A. -- when Champion was there, why, he would pan and I would take a portion of his sample and I'd pan, and then we'd compare them.

Q. Yes, and then you would occasionally check assays with the Montana Assay Office?

A. Yes.

Q. To see that you were checking it correctly, is that right?

A. Yes, sir.

Q. And that's standard practice in checking that type of material?

A. Absolutely.

Mr. Hogg was a disinterested witness: Tr 112.

Q. You have never had any personal interest or financial interest in this company or in these claims?

A. No, sir.

Q. And your position has been purely that of a professional engineer?

A. Absolutely, and they paid me my salary.

Q. And they paid you your salary?

A. That's all they paid me, all I asked for. I have never taken an interest in anything -- in any mine examination that I've ever made.

George E. Hogg was 82 at the time of trial. His reports were written in 1930, 1940 and 1942, about a quarter of a century ago. His reports were delivered to the company and became a part of its business records.

Records made in the regular course of business are not hearsay.

28 USC §1732. (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

In the light of the record the court may wish to correct the impression that Mr. Hogg's testimony was hearsay.

The court went on to say: "Even if I assume that Champion's panning estimates were business records, and thus admissible in evidence, those estimates, on their face, are not sufficient to establish the claim." App. p. 13

Thus the question: Is the discovery of a block of 18,600 tons of cinnabar ore containing 5.2 pounds of mercury per ton - averaging approximately $20.00 per ton of cinnabar ore - a discovery as a matter of law?

As a matter of law, the Department determined in Woodard and Belisle that ores of the approximate value per ton as here were sufficient discovery. Both of these cases show circumstances under which a discovery was established.

In United States v. Woodard, Oregon Contest 172, 173 (1957) set out in the Record at p. 328, it was held:

> "In regard to the Sampson claim, more substantial evidence of mineralization was found. Three out of four mineral examiners found assay values from $4 per ton for a 50 inch sample to $28.29 per ton for a 10 inch sample (Table A) in a vein structure with both width and consistency. I conclude that the evidence of mineralization is sufficient to justify the belief that there is a reasonable prospect of success in developing a valuable mine on this claim and that there has been a valid discovery. Accordingly, the Sampson, together with the Fraction Amended and Luckey Strike are declared valid lode mining claims."

In United States v. Belisle, Colo 034358 (1966), a case under the Surface Resources Act, set out in the Appendix p. 143, it was held:

> "Mr. Roberts testified that ore having a value of $20 a ton is a working proposition. The sample taken from the Black Dragon by Mr. Belisle in 1965 from near the surface contained minerals of considerably higher value than $20 a ton. The sample taken from the Black Jack claim in 1950 showed values of $49.90 per ton. Add to this evidence the evidence of the mineral exposed in the workings underneath the Black Jack and it is clear that the mining claimant has successfully refuted the prima facie case presented by the Forest Service."

"The 'prudent man' rule as expressed in Castle v. Womble, 19 L. D. 455 (1895) is that a valid discovery of mineral has been made where the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. In the present case, the evidence shows clearly that this test has been met, indeed exceeded, by the mining claimant."

The Trial Examiner found that "Ore Reserves were developed as reported on p. 24, Exhibit "J". Specifically a block of ore $\frac{155 \times 18 \times 80}{12}$ = 18,600 tons of 5.2 lbs. per ton, p. 24, Exhibit "J". See p. 12 of this Brief. His findings should not be disturbed.

The substantiality of the evidence rule applied in administrative proceedings is not the same as a scintilla of evidence rule which prevails in Oregon. No rebuttal was offered to dispute Hogg's testimony about the standard procedure for determining quantities of mercury in samples of cinnabar ore.

Moreover, the examiner had opportunity to observe the witness, his demeanor and manner, when testifying. Mr. Hogg's difficulty in remembering events of many years ago should not be seized upon as a substitute for agency finding contrary to his uncontradicted evidence. Agency assumption cannot be made a substitute for substantial evidence to support an agency finding.

Bound, as we are by the record, the court may find it proper to correct the decision of the court below affirming these administrative errors.

V

SINCE THE CONTESTANT DID NOT PLEAD NOR PROVE A PRIMA FACIE CASE BY SUBSTANTIAL EVIDENCE AS TO EACH OF THE CLAIMS CONTESTED, THE COURT BELOW SHOULD HAVE CORRECTED THIS ADMINISTRATIVE ERROR IN FAILING TO DISMISS THE CASE, AT LEAST AS TO TWENTY-ONE CLAIMS WHICH WERE NOT SAMPLED.

Since there was no complaint, there was no pleading. There was no pleading to inform the mining claimant that the Government intended to try 22 cases, i.e., whether discovery had been made on each of the 22 claims. We have found no precedent to justify the procedure followed by the Department in this case, and we submit that there is none.

If the agency intends to challenge each of the 22 claims, the mining claimant should be put on notice of the issue as to each claim by a complaint. For example, in Coleman v. United States, 363 F 2d 190, 203 (9th cir 1966), the court held that if the good faith of the applicant is in issue, the applicant for patent should be put on notice of the issue by the contest complaint.

The agency has the burden of proof. The Administrative Procedure Act provides, 5 USC §1006 (c), that "the proponent of a rule or order shall have the burden of proof". This statute places the burden of proof on the Government; at least the Government has the burden of establishing a prima facie case by substantial evidence as to each of the 22 claims.

The agency did not carry its burden of proof and did not establish the prima facie case by substantial evidence. The Secretary admits this. He said that the Government was not able to present evidence as to each of the 22 claims separately. R 291. He was mistaken in holding that it was not necessary for the Government to make out a prima facie case of lack of discovery as to each claim.

The Supreme Court discussed the substantial evidence required to support an administrative decision in Universal Camera Corporation v. N.L.R.B, 340 U.S. 474, 478, 487, 488 (1951) Mr. Justice Frankfurter deplored the

tendency of the courts to interpret the substantial evidence rule as requiring courts to affirm an administrative decision if the evidence favorable to that result was "substantial" when considered by itself. He stressed the requirement of the Administrative Procedure Act that the whole record before the administrative agency must be scrutinized by the reviewing court and that the evidence supporting the administrative decision must be considered in the light of whatever fairly detracts from its weight. When tested in the light of the substantiality of evidence rule, the evidence presented by the contestant falls far short of being a prima facie case. An agency order cannot be supported by a mere scintilla of proof. Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541, 32 S Ct. 108, 56 L. ed. 308.

There is no substantial evidence supporting the administrative finding of lack of discovery. Neither of the two witnesses called by the Government on the issue of mineral discovery expressed an opinion as to whether or not a prudent man would be justified in spending time and money on the claims with a reasonable prospect of success in developing a valuable mine. Mr. Holmgren testified that he had no experience with cinnabar. Tr 37. His samples were all iron stained, weathered basalt and were not cinnabar. He did not know the name of the formation. Tr 22. He admitted that he was not qualified to interpret the map and structural conditions shown in the U. S. Geologic Survey Bulletin Exhibits A and B, Report on Geophysical Survey of the Johnson Creek Area, Ochoco Quicksilver District, by G. D. Bath and K. L. Cook, Tr 21. According to Exhibit 1, Mr. Holmgren took four samples of the country rock on the Lost Mine Claim and none on the other claims. Mr. Shirley was on the claims, but

he took no samples.

Administrative orders are void if the finding is contrary to the indisputable character of the evidence. Interstate Commerce Commission v. Louisville & N. R. Co., 222 U.S. 88, 33 S Ct. 185, 87 L ed. 431. Southern R. Co. v. Virginia, 290 U.S. 190, 54 S Ct. 148, 78 L ed 260. Hence an agency order based upon evidence which clearly does not support it is an arbitrary act, against which courts afford relief. Northern P. R. Co. v. Department of Public Works, 268 U.S. 39, 45 S Ct. 412, 69 L Ed. 836.

We submit that the sampling of country rock on the Lost Mine Claim was not substantial evidence of want of discovery there, but even if the Government's evidence as to that claim were to be considered as a prima facie case as to that one claim, then at least as to the 21 claims which were not sampled, the agency case certainly should have been dismissed.

VI

SINCE THE CONTESTANT DID NOT PLEAD AND PROVE THAT THE BOUNDARIES OF EACH OF THE CLAIMS HAD NOT BEEN MARKED WHEN LOCATED IN 1929-1932, THE ABSENCE OF MARKERS THROUGH NO FAULT OF CLAIMANT IN 1962, DOES NOT CAUSE A FORFEITURE OF THE CLAIMS, AND THE COURT ERRED IN FAILURE TO CORRECT THIS ADMINISTRATIVE ERROR.

There is no pleading alleging, no proof establishing that the claims were not marked on the ground when they were located in 1929-1932. Contestant makes no least contention that the claims were not marked properly when they were originally located. But the contention is made that the failure to maintain the markers in 1962 when the claims were visited by the government examiners caused a forfeiture of the claims.

The statute, 30 USC §28 provides that "the location must be distinctly marked on the ground so that its boundaries can be readily traced" and that the claim must be "located by reference to some natural object or permanent monument as will identify the claim".

A location requires two acts: a discovery and a marking of the boundaries. Cole v. Ralph 252 U.S. 286, 296 (1929). When the discovery is made and the boundaries are marked, the locators right to the ground embraced within his claim is vested. His rights are not divested by the disappearance or obliteration of his markers. Book v. Justice Mining Co., 58 F 106 (1893); Jupiter Mining Co. v. Bodie Consolidated Mining Co., 11 F 666 (CC Cal 1881); Moore v. Steelsmith, 1 Ala. 121 (1901); Bender v. Lamb, 133 Cal. App. 348, 24 P 2d 208 (1933) cert den. 291 U.S. 662; Nichols v. Ora Tahoma Mining Co., 62 Nev. 343, 151 P 2d 615 (1944); Steele v. Preble, 158 Or. 641, 77 P 2d 418 (1938).

The locator is not divested of his claim when his markers are obliterated due to the lapse of time Larned v. Dawson, 90 F Supp. 14 (D. Alaska 1950) (40 years lapse of time). Nor is the locator divested of his title when the markers disappear through the act of a stranger. Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co., 125 F 409 (1903). A mining claimant has no duty to keep his markers in repair or to maintain them. Bender v. Lamb, supra.

The Secretary's decision holding that a mining claimant must maintain his boundary markings for the benefit of agency engineers imposes a

non-statutory requirement upon a mining claimant. It is a departure from settled law. The statutory provision that the administrative execution of our public land laws is to be under the supervision and direction of the Secretary of the Interior does not clothe him with any discretion to enlarge or curtail the rights of mining claimants under the laws or to substitute his judgment for the will of Congress as manifested by a congressional act. Payne V. Central R. R. Co. 255 U.S. 228, 41 S Ct. 314, 65 L Ed 598.

Actually the Government's examiners were able to determine, and did determine, the boundaries of each claim by reference to a section corner--a permanent monument as will identify the claims. Compare the claim map prepared by Mr. Holmgren with the claim map prepared by Mr. Hogg. ie Exhibit 1 with Exhibit "G". Both maps show the boundaries of each claim and both are the same as to the boundaries of each claim.

Therefore since there was no pleading or proof that the claims had not been marked when located 1929-1932, the absence of markers in 1962 does not cause them to be forfeited.

VII

SINCE THE HEARING EXAMINER SIGNED A NOTICE OF HEARING ASSERTING THE CHARGES AT THE DIRECTION OF THE PROSECUTING AGENCY THE COURT BELOW FAILED TO CORRECT THE ADMINISTRATIVE DECISION HOLDING THAT THE EXAMINER WAS NOT DISQUALIFIED UNDER THE ADMINISTRATIVE PROCEDURE ACT, 5 USC §1004(c).

The Administrative Procedure Act specifically forbids the Hearing Examiner from acting under the direction of those engaged in the prosecuting function. The court below erred in equating the notice of hearing, to a pre-

trial order because a pretrial order contains a statement of the contentions which each party proposes to prove. The notice of hearing signed by Examiner Holt presents the charges asserted at the request of forestry, the prosecuting agency.

A hearing examiner shall not be subject to the "....direction of any officer, employee, or agent engaged in the performance of investigating or prosecuting functions for any agency". (Underscoring supplied). 5 USC 1004 (c). This clear command forbids a hearing examiner from acting under direction of those engaged in the prosecuting function, and representing "any agency" in the "prosecuting function".

Section 613 (a) of the Surface Resources vests in Forestry the power to investigate and to initiate a prosecution against mining claims and their owners. Forestry had the right to request Interior to hear and determine the validity of title to mining claims under Section 613 (c). But when these provisions are read in connection with the Administrative Procedure Act, it becomes clear that a hearing examiner is disqualified from acting as an examiner when he acts under the direction of Forestry, which is engaged in the investigative and prosecuting functions. 5 USC 1004 (c).

The House Committee on the Judiciary, House Report No. 1980, May 3, 1946, when considering the Administrative Procedure Act, commented that when the same men are obliged to serve both as prosecutors and judges: "This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings,

which the Commissioner, in the role of prosecutor, presented to itself." U.S. Code Cong. and Adm. Service, 79th Cong., 2d Session (1946).

When the examiner gave notice of the charges asserted by Forestry at the direction of Forestry, he was doing the very thing that is prohibited by the Administrative Procedure Act. Since the Hearing Examiner disqualified himself under the Administrative procedure Act from hearing the case, the proceeding is a nullity. The District Court erred in upholding administrative action denying mining claimant's motion for change of hearing examiner.

CONCLUSION

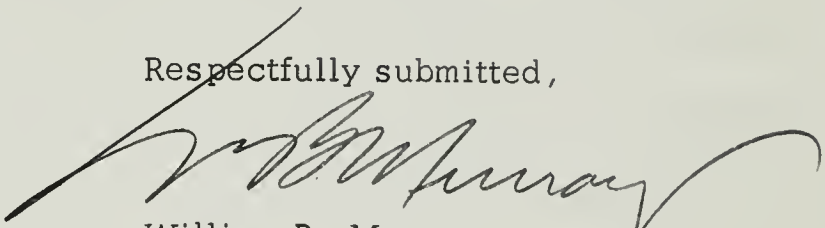
When Congress delegates administrative power and spells out the procedural safeguards under which that power may be exercised, then it would seem desirable that our courts should enforce those safeguards.

The expertise of the courts qualifies them better to decide law with respect to property rights. Since titles to mining claims are made to depend upon the acts of location, it would seem important for our courts to correct all administrative attempts to depart from the established law.

The Administrative Procedure Act applies to all delegations of administrative power and its purpose is to establish standards of fair dealing with citizens in an ever increasingly powerful bureaucracy.

For the foregoing reasons, we respectfully submit that the decision of the court below should be reversed.

Respectfully submitted,



William B. Murray
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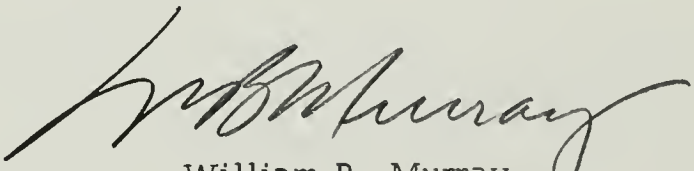
525 Failing Building
Portland, Oregon 97204
226-3819

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



William B. Murray
Attorney for Appellant

SURFACE RESOURCES ACT - 30 USC §613 (a), (c), (e)

SECTION 613. PROCEDURE FOR DETERMINING TITLE UNCERTAINTIES--NOTICE TO MINING CLAIMANTS; PUBLICATION; SERVICE

(a) The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable

through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to

file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim--

Hearings

(c) If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, which place of hearing shall be in the county where the lands in question or parts thereof are located, unless the mining claimant agrees otherwise. Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single hearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearings shall be set as shall be necessary to comply with this provision. The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and affectiveness of

any mining claimant's so asserted right or interest under the mining claim,

Failure to deliver or mail copy of notice

(e) If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person or as to the rights asserted by that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person. July 23, 1955, c. 375, §5, 69 Stat. 369, amended June 11, 1960, Pub. L. 86-507, §1 (26), 74 Stat. 201.

CODE OF FEDERAL REGULATIONS TITLE 43 CHAPTER 1 SUBPART C CONTESTS AND PROTESTS JANUARY 1, 1962

SUBPART C---CONTESTS AND PROTESTS[1]

PRIVATE CONTESTS AND PROTESTS

Section 221.51. By whom private contest may be initiated. Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U.S.C. 185), or the act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceed-

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1/ In addition to the material under this heading, the general provisions under Subpart D of this part shoud be consulted.

ing will constitute a private contest and will be governed by the regulations in this part.

Section 221.52. Protests. Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances

Section 221.53. Initiation of contest. Any person desiring to initiate a private contest must file a complaint in the land office which has jurisdiction over the land involved, or, if there is no such land office, in the Office of the Director, Bureau of Land Management, Washington 25, D.C. The contestant must serve a copy of the complaint on the contestee not later than 30 days after filing the complaint and must file proof of such service, as required by §221.95, in the office where the complaint was filed within 30 days after service. [Circ. 2068, 26 F.R. 10479, Nov. 7, 1961]

Section 221.54. Contents of complaint. The complaint shall contain the following information, under oath:

(a) The name and address of each party interested, including the age of each heir of any deceased entryman.

(b) A legal description of the land involved.

(c) A reference, so far as known to the contestant, to any proceedings pending for the acquisition of title to, or an interest in, such land.

(d) A statement in clear and concise language of the facts constituting the grounds of contest.

(e) A statement of the law under which contestant claims or intends

to acquire title to, or an interest in, the land and of the facts showing that he is qualified to do so.

(f) A statement that the proceeding is not collusive or speculative but is instituted and will be diligently pursued in good faith.

(g) A request that the contestant be allowed to prove his allegations and that the adverse interest be invalidated.

(h) The office in which the complaint is filed and the address to which papers shall be sent for service on the contestant.

(i) A notice that unless the contestee files an answer to the complaint in such office within 30 days after service of the notice, the allegations of the complaint will be taken as confessed. [Codification: In §221.54, the last sentence reading as follows: "If the complaint does not meet each of these requirements, it will be summarily dismissed." was deleted by Circular 1962, 21 F. R. 7622, Oct. 4, 1956.]

Section 221.58. Service. (a) The complaint must be served upon every contestee. If the contestee is of record in the land office, service may be made and proved as provided in §221.95. If the person to be served is not of record in the land office, proof of service may be shown by a written statement of the person who made personal service, by post-office return receipt showing personal delivery, or by an acknowledgment of service. In certain circumstances, service may be made by publication as provided in §221.60.

Section 221.64. Answer to complaint. Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending an answer specifically meeting

and responding to the allegations of the complaint, together with proof of service of a copy of the answer upon a contestant as provided in §221.95. The answer shall contain or be accompanied by the address to which all notices or other papers shall be sent for service upon contestee.

Section 221.65. Action by Manager. (a) If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing.

Section 221.68. Proceedings in Government contests. The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests.

ADMINISTRATIVE PROCEDURE ACT

5 USCA §1004 (c). Authority and functions of officers and employees.

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in

that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

5 USCA §1005 (b). Issuance of process; investigations; transcript of evidence.

(b) No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

5 USCA §1008 (a). Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.

In the exercise of any power or authority--

(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law....

5 USCA §1009 (c). Acts reviewable.

(c) Every agency action made reviewable by statute and every final

eral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. (R.S. §2322.)

MINING CLAIMANT'S EXHIBIT J

LETTER OF TRANSMITTAL

Mr. George Dreis, Secretary,
Independent Quicksilver Company,
712 Swetland Building,
Portland, Oregon.

Dear Sir:

I herewith submit a brief report of your Company's holdings, having gained the following information while in your employment, directing the exploratory and drilling operations at your property since June, 1939, to the present time.

The report consists of twenty-five pages and five plates. It has been prepared in quadruplicate, one original and three copies have been delivered to you.

Very respectfully submitted,

(Sgd) George C. Hogg

LOCATION, ACREAGE AND CLIMATE

The Independent Quicksilver Company's property consists of 22 lode mineral claims, held by location, situated in Section 17, 20 and 21, T. 14 S., R. 20 E., Willamette Meridian, Ochoco Mining District, Ochoco National Forest Reserve, Lookout Mountain, Crook County, Oregon. The mineral holdings consist of the following lode claims and are shown on Plate I:

Princess	Eastern Star
Commodore	Greenback
Bonanza	Happy Chance
Zero	Grub Stake
Cornucopia	Astac
Jewel	Crystal
Ajax	Ruby
Good Luck	Pioneer
New Era	Prospect
Lost Mine	Aetna
Cosmopolitan	Columbia

These claims, comprising approximately 440 acres, adjoin the Mother Lode Mine Claims on the north, and are located in the northwest portion of the Round Mountain Quadrangle on the steep rugged north slope of Lookout Mountain at an approximate elevation of 5700 to 5200 feet above

sea level, about three miles north of Lookout Mountain Forest Rangers' Observation Station.

Prineville, a town of about three thousand inhabitants, on the City of Prineville railroad, a connecting branch line to the nearest railroad point and postoffice thirty-seven miles west of the property.

The property is reached from Prineville over the Prineville-Mitchell Highway No. 28 by means of automobile or motor truck to the Ochoco Forest Rangers' Station and CCC Camp, a distance of twenty-eight miles, thence over an easy grade, good Forest-Service road, a distance of nine miles, the last mile of which the grade is quite steep. This road is and can be negotiated the entire year if the snow is kept plowed off during the winter months.

The climate is delightful in summer and fall, days are warm and nights cool, the winters are not too severe, the temperature ranging this year (1939-40) from 36 degrees above zero to zero for the months of November, December, January and February.

Rainfall is limited in the summer months, there being frequent rains during the early spring and occasional rain in early fall.

The first snow generally falls around the first of October but does not last long. Snowfall is more or less excessive and comes to stay about December fifteenth. It lies on the ground until about April fifteenth, except in drifts, where it lasts until May fifteenth or later. The depth of snow this year was three and a half feet. This is a lighter fall than normal; however,

it is believed that substantial operations can be carried on continuously the entire year with only minor handicap on account of snow and cold weather.

The present mine camp consists of two (fully equipped, running water, etc.) 15' x 30' cabins, which can accomodate ten men. One of these cabins at the present time is used for a mess-hall, in conjunction with sleeping quarters; also, there are several sheds and a 15' x 9' workshop.

Abundant water for domestic purposes is available at the present mine campsite from springs on the property. Additional water necessary to operate a reduction plant can be easily developed from these springs (which are amply protected by water rights) and seepage from mine workings. Also, sufficient water can be developed on either Canyon or Johnson Creeks to install a small power plant to generate electricity for power and lights for mine and plant operations as well as camp purposes, if thought desirable.

GEOLOGY AND ORE GENESIS

The Independent Quicksilver Company's property is located in the northwest portion of the Round Mountain Quadrangle and, since the geology of this district has been so ably and graphically described by W. D. Wilkinson in the State of Oregon Department of Geology and Mineral Industries' recently published bulletin (a copy of which is hereto attached to this report), no attempt will be made to go into the geology of the district other than to bring about the significance of the salient points which are pertinent to the Company's holdings.

Exhibit J pp. 2-3

Quicksilver occurrences are definitely associated with volcanism.

The geologic history of the region is one of volcanic origin, beginning with the Clarno formation (basalts and andesites) of the Eocene, in which the cinnabar deposits of the district most uniformly occur, and continuing until late Pliocene or early Pleistocene period.

This volcanic activity produced stresses and strains, causing the faults and folds found in the older formation, and resulted in a wide variety of igneous rocks being distributed throughout the district. Intrusive rocks are not uncommon since the older formations are cut by dikes and plugs of younger rocks.

One of the major zones of mineralization of the district extends from the base of Lookout Mountain, approximately N 60 degrees E to Johnson Creek, traversing the Mother Lode, Independent, Develsfood, Homestake, Mercury, Number I, Central Oregon and Wesserling properties.

In this zone there are a series of faults striking approximately N 62 degrees E. N 45 degrees E, N 20 degrees E, and N 10 degrees E. Movement along these faults produced shear zones along which mineralization is concentrated at these fault intersections and in the gouge occurring at these intersections.

In the early Tertiary period, the intrusions, closely following the Clarno lavas, were heavily charged with mineralized solutions, which, under favorable conditions, resulted in the precipitation of cinnabar in the Clarno formation.

Exhibit J pp. 3-4

The mineralization encountered to date at the Independent Quicksilver Company's property appears to be in the Clarno andesites. The few places that basalt has been observed, the andesite has been so tightly fused with the basalt that the point of contact has been hard to determine, thus permitting no chance for mineralization along this contact, and indicating that only a short period of time elapsed between the two lava flows.

The most important fracturing of the older country rock is along a line approximately N 62 degrees E. These fractures occur in a parallel series, spaced from a few feet to hundreds of feet apart. For the most part they are filled with igneous material and can be termed dikes. These dikes are andesite and can be distinguished from the older country rock through which they penetrated as they are more crystalline. In width they vary from a few inches to a hundred feet or more.

There seems to be contact metamorphism, for beyond the walls of the dike for many feet the andesite country rock is considerably altered, the original components of which it was composed have been altered chemically, by the heat from the intruding material of the dike and other agencies. The altered andesite near the dike walls by reason of this alteration is, therefore, susceptible for mineral impregnation or for leaching by acid solutions, and the consequent replacement of basic material by mineral held in the attacking solutions. Had there been no further activity in the district by chemical or igneous agencies no ore bodies would have been formed. Later, however, in the early Tertiary period, the crust of the earth surface was again broken

along an axis north and south (approximately N 10 degrees E). These fissures are represented by dikes running north and south. It is very probably that these north and south fractures are the channels through which quicksilver minerals in vapor or solution sought to reach the surface from a deep seated source. Where these fissures are filled with intruded lavas, there is evidence of contact metamorphism along the walls of the dike extending a few to many feet into the country rock, gradually fading out into unaltered materials as distances increase from the dike. The evidence seems to indicate that aqueous solutions carrying quicksilver rising through North and South vents, impregnated the altered andesite adjacent to the dikes and where these dikes intersected other dikes running N 62 degrees E, the solutions worked along their walls impregnating the altered andesite country rock.

NEIGHBORING PROPERTIES

The MOTHER LODE Mine, which adjoins the Independent Quicksilver Company's property on the south, was located as early as 1906. It was upon this property that the first discovery of quicksilver was made in the Ochoco District. The mine has been operated by several different companies, and has been known as the American Almedan, Consolidated Quicksilver, Cram Incorporated, and is now being operated by the Champion Mining Company.

The development at the property consists of several old tunnels, the Cram Swamp, Champion and Adit tunnels and crossouts, drifts, raises and stopes off these tunnels, all of which are now caved. Tunnel No. 4 and the

workings of this tunnel, most of which were driven during operations by the Cram Incorporated Company, are still open and accessible. In all, an excess of 3,000 feet of development work has been performed on the property, and approximately 5,000 tons of ore mined, from which possibly 500 flasks of quicksilver has been recovered.

During the regime of the Consolidated Quicksilver Company, under this name it is described in U. S. G. S. Bulletin 846A, what is known as the Swamp and Champion veins were discovered and opened up by the Champion and Adit tunnels, and it is from these veins that the major portion of the ore to date has been mined.

The deposition of the ore in the Champion vein or mineralized zone is mostly in the nature of stock work; seamlets of high grade cinnabar from the thickness of a knife blade to one or two inches or more, at various intervals, in places closely associated and at others one to two feet apart, occurring along and in fractures approximately N 10 to 20 degrees E, in the highly oxidized andesites in the upper workings and on the Adit and No. 4 tunnel levels in the hard unaltered Clarno andesites.

The Swamp vein more or less parallel and 100 feet East of the Champion vein is a highly altered clay gouge; in fractures in the altered andesite country rock, the cinnabar occurring in concentrated bunches, impreganted in the gouge in places and as small seamlets in others. Both of these veins or mineralized zone extend to and traverse the Independent Quicksilver Company's holdings.

Exhibit J pp . 6-7

During the operations of the Consolidated Quicksilver Company, the Champion vein was mined from the Adit tunnel level to the surface, the width of the commercial ore varied but averaged about one set wide, and while some of the ore was high grade, 25 pounds or better, the average was about 10 pounds per ton.

The Swamp vein was mined from the Swamp tunnel to the Surface, an approximate distance of 15 feet and from the Adit tunnel, 150 feet below the Swamp tunnel to 5 or 6 sets above said tunnel, when the stope was lost by a cave. This vein varied in width from two to fourteen feet, and in value from 2 to 30 pounds per ton (200 tons of which averaged 23 pounds per ton), However, the bulk of the tonnage mined before the stope caved in 1930, was of considerable lower grade.

When the Cram Incorporated took over the property, tunnel No. 4 (which had been started before the Consolidated Quicksilver Company discontinued operations in 1931) was continued and encountered the Champion vein on this level, 105 feet below the Adit tunnel, 431 feet from the portal of the tunnel. Stoping operations were subsequently started, one of which reached a height of six sets above the tunnel level when it caved, being 8 sets in length and one to two sets wide on the first floor. Some high grade was encountered in this stope, as is evidenced by ore of such grade being left along the hanging wall of the vein on the sill floor of the stope. The ore mined from this level was treated in the 15 ton Gould Rotary Furnace on the property, then as now, located below tunnel No. 4. No record is available

as to the tonnage treated by judging from the slag dump and the stope maps believe in excess of 2,000 tons must have been mined. Reliable source informs me that more than 150 flasks of quicksilver were produced from the ore treated.

During the operations of both the Consolidated Quicksilver and Cram Incorporated companies, the reduction plant was very inefficient and doubt exists if more than 50% of the values in the ore were recovered.

In the spring of 1939, the Champion Mining Company took over the property and opened up both the Champion and the Swamp veins on the surface, several hundred feet north of the workings by previous companies, by dozer excavations to depth of 10 to 15 feet below the surface. Subsequently, a series of tunnels were driven to cut the veins exposed in the surface cuts, first 20 to 30 feet below the dozer excavations and then alternately, 20 to 30 feet below each successive tunnel. Very favorable results have been obtained to date in most instances by this procedure. Ore of as high grade as 40 pounds has been mined. However, Mr. Champion advises me that the ore treated in the reduction plant averages 15 pounds to the ton.

Tunnel No. 4, which was caved in a few places, was cleaned out and retimbered, and the tunnel was being advanced to get beneath the good ore encountered in the old Adit tunnel in the Swamp vein. The property is equipped with a 15 ton Gould Rotary Furnace, having cast-iron and tile pipe condenser. It is operated by a 15 HP Fairbanks Morse engine. The plant, which was very inefficient, was remodeled under Mr. Champion's supervision, a sirocco dust precipitator and an additional tile condenser were installed so

that the plant now operates very efficiently.

Production the first of the year 1940 was at the rate of 2 flasks per day. This property should become a steady producer of quicksilver.

The Devil's Food Mine is a prospect, located on Johnson Creek about one mile northeast of the Independent Quicksilver Company's holdings.

The workings consist of a drift and cross-cut 150 feet, and 35 feet in length, respectively. A raise has been driven on the vein from the drift to the surface, a distance of 50 feet.

The vein occurs in and along a fault zone or fracture, which varies from 2 to 8 feet in width, striking approximately N 80 degrees E and dipping 70 degrees to 78 degrees S. The fault zone passes through both the coarse conglomerate and the fairly coarse grained basaltic country rock. Ore is found in both. The owner, W. Endicott, reports some ore of a very good grade has been encountered.

The Homestake Mercury Mine, which has been known as the Paulsen and Sayler, International Incorporated and Johnson Creek Mine, was located by W. Wesserling in 1929, and is located on Johnson Creek about 1-1/2 miles north east of the Independent Quicksilver Company's property.

The development consists of a glory-hole, open cuts, three tunnels, 125, 150 and 300 feet in length, respectively; and a shaft or winze sunk on the vein from the 300 foot tunnel to a depth of about 20 feet. A sample was taken by the writer at the bottom of the winze in 1931, which assayed 40.6 pounds per ton. All of the above mentioned workings are now caved and inaccessible.

Exhibit J pp. 9-10

The winze or shaft and old caved workings were for the most part driven along one of the major fault fractures of the district, trending N 62 degrees E and the ore occurs along fault fractures and fissures on both the hanging and the foot walls of the vein in a highly altered andesite or maybe rhyolite of the Clarno formation.

Some high grade, and considerable ore of a very good grade, was mined in 1930 and treated in a small 2- or 3-ton experimental external fired vertical furnace. This furnace proved a dismal failure, only 17 flasks being recovered from several hundred tons of ore treated. In 1931, 8 large D retorts were installed and operated during 1931-32, and with them, the production was brought up to 250 flasks.

Since 1933, there has been no production, though a crosscut tunnel is now being driven in a coarse grained basaltic rock, which shows no mineralization and little or no alteration, to cut the ore encountered in the winze, 80 feet below the bottom of the winze.

This mine has made a good showing for the amount of development performed. If amply financed and efficiently managed, this prospect should make a mine.

The Number One Mine is located about two miles northeast of the Independent Quicksilver Company's property, and adjoins the Homestake Mercury Mine on the east.

The development consists of a shaft 100 feet deep and several hundred feet of drifts and cross-cuts off this shaft at different levels. Considerable ore of good grade is reported to have been mined from this

development. The ore was treated in a D retort with which the mine is equipped. About 50 flasks of quicksilver were recovered. These workings are nowinaccessible, due to the fact that the shaft and workings are filled with water.

Recent work consists of a cross-cut tunnel cutting the major fault zone, trending N 60 degrees to 65 degrees E, dipping 70 degrees S, and a drift along this fault zone, in all about 300 feet of exploratory work. Ore of a good grade was found in places in the drift, particularly where the major fault was intersected by cross fractures trending N 12 degrees E. Also, a portion of the Company's holdings have been prospected by core-drill holes, the number of which, and the grade of ore encountered, are not known. It has been reported that the results of this work were very satisfactory. No operations are being carried on at this property at the present.

The Blue Ridge Mine, discovered by W. Wesserling, is located about 2-1/2 miles northeast of the Independent Quicksilver Company's holdings, and adjoins the Number One Mine on the West.

This property was formerly known as the Blue Ridge Mercury Company, Western Resources Incorporated, and at present the Central Oregon Quicksilver Company.

The development at the property consists of a large open cut, 100 feet or more in length, which is now partly filled with water and surface sluff, from which the ore was mined by a steam shovel during the first operations at the property. The ore occurred in a highly altered clay gouge in the

altered andesite country rock. It is of much the same character ore as that which occurs in the Swamp vein at the Mother Lode, about three miles southwest of this mine.

This vein is most likely in the same major fault fracture N 62 degrees E of the district as the Mother Lode, Independent Quicksilver, Johnson Creek, and Number One Mines' deposits occur. Operations were discontinued for a period, and later a shaft was sunk to the 100 foot level, and several hundred feet of drifts have been driven. Mining operations are now being carried on underground. It has been reported that very high grade ore has been encountered.

The first ore was treated in a 4 x 40 Allis Chalmers Rotary kiln, fed by a screw-feeder and driven by a 20 HP Fairbanks-Morse oil engine. Owing possibly to a too small cyclone dust precipitator and a very skimpy and inadequate tile pipe-condensor, the results were very unsatisfactory. Later, two ten-pipe banks of retorts were installed, and the ore now mined is treated in one series of these retorts. Production in the early part of last December was at the rate of one flask per day.

The Wesserling Prospect lies in a flat on Johnson Creek, a short distance southeast of the Blue Ridge Mine. No underground work has been performed, but the occurrence of cinnabar on the property has been traced in a northeast-southwest direction by panning and drilling. Mr. Wesserling reports that cinnabar showing, thus obtained, very good.

The above described properties all lie in the major fault fracture

trending N 62 degrees E in the Clarno formation, from which the production (850 to 1,000 flasks) to date has been gained.

The Independent Quicksilver Company's property lies in the south central portion of this productive zone.

Numerous other properties in the district are described in the State of Oregon Department of Geology and Mineral Industries' Bulletin, hereto attached.

HISTORY AND DEVELOPMENT

In 1929 Richards and Conlin located ten claims which adjoin the Mother Lode Mine on the north, and in 1930 the Independent Quicksilver Company took over their holdings, and subsequently have added to them by location; so that at present, the holdings consist of twenty-two claims and substantial water rights.

Prior to the location of these claims by Richards and Conlin, and the Independent Quicksilver Company, some of the claims were evidently previously located, as is evidenced by old tunnels, pits, and cuts, which are now caved and filled, thus making inspection or examination impossible for this report.

In 1931, the Company carried on an extensive campaign of development, which consisted of numerous surface cuts, pits and trenches on many of the Company's claims, all of which are now either entirely or partly filled and caved. The report states that ore of a low grade was encountered in places. Also a tunnel was started on the Greenback Claim, the location of

the succeeding years, until 1934, when it was discontinued, being 204 feet in length. This tunnel was started and has been driven for most of its length in a slightly altered to unaltered andesite of the Clarno variety, and three veins of 2, 4 and 1 feet width, 36, 76, 126 feet from the portal of the tunnel, respectively, were encountered, samples from all of which assayed by the Oregon State Department of Geology and Mineral Industries showed trace of cinnabar. These veins will be prospected in depth with the Calox drill owned by the Company at a future date.

The face of the tunnel is in a hard black basalt, the contact of which with the unaltered andesite occurred 187 feet from the portal of the tunnel.

In 1937, the Company decided to diamond drill their holdings by angle or cross-cut holes, with the idea of determining the mineralized area.

A contract was let to Jantsen Bros., of Beaverton, and seven holes (5 on the Bonanza and 2 on the Zero) for a total footage of 831 feet were drilled. The greatest vertical depth obtained was 148.3 feet. The records show commercial ore of low grade was encountered in two holes.

In 1938, the Company purchased an Ingersoll-Rand Calox drill. Four shallow holes, the location of which are shown on Plate 1, 38, 35, 31, and 92 feet in depth, respectively, for a total depth of 196 feet were drilled. The greatest vertical depth obtained was 35.0 feet. Commercial ore of low grade in two of the holes is on record in the logs. This is the extent of the development prior to 1939.

Exhibit J pp. 14-15

In June, 1939, what is known locally as the Champion and Swamp veins, from which the major production of the Mother Lode Mine has been derived, as well as a major fault fracture trending N 62 degrees E, in which the productive vein of the Johnson Creek Mine lies, were traced to the Independent Quicksilver Company's property. Surface cuts were excavated and pits sunk at various places and intervals on these mineralized fractures or zones on the Greenback, Bonanza, New Era and Happy Chance Claims, which, it was found, these veins or fractures traverse.

The Johnson Creek mineralized fractures trending N 62 degrees E were further opened up by dozer cuts A, C, D and F on the Bonanza, G on the New Era, and E on the Happy Chance Claim, as shown on Plates 1 and 2.

The surface soil was removed and the highly oxidized andesite country rock of the Clarno formation was penetrated to a depth of 5 to 8 feet.

Cut A, length 350 feet, width 10 to 11 feet, and depth 5 to 12 feet, was driven N 15 degrees E, across the major fault fracture trending N 62 degrees E. (as shown on Plates 1 and 2), exposing 25 feet of cinnabar-bearing rock of commercial grade. The location of the samples taken and the estimate value of which were arrived at by careful panning are shown on assay map, Plate 2.

Cut C, length 350 feet, width 10 to 11 feet, and depth 3 to 12 feet, was driven N 20 degrees W across the same fault fracture, 110 feet S 62 degrees W of cut A (as shown on Plates 1 and 2), exposing 20 feet of commercial ore. The location and value of samples taken are shown on Plate 2.

Cut F, length 550 feet, width 10 to 11 feet and depth 2 to 12 feet, was driven N 15 degrees W across the same fault fracture 75 feet S 62 degrees W of Cut C, and about 100 feet N 62 degrees E of the south boundary of the Company's holdings, exposing 15 feet of commercial ore. The location and values of samples taken are shown on Plate 2.

Cut D, 250 feet in length, 37 to 38 feet in width, 3 to 14 feet in depth, was excavated along the major fault fracture N 62 degrees E. from Cut C to 140 feet N. 62 degrees E. of Cut A, exposing commercial ore from Cut C to 100 feet N. 62 degrees E. of Cut A. The location and value of samples taken are shown on Plate 2. These 4 cuts, A, C, F and D tend to prove the continuity of an ore zone on the surface at least 15 to 25 feet in width and 285 feet in length, the distance between Cut F and a point 100 feet E. of Cut A. Pits 1 and 4, the location of which is shown on Plate 2, were sunk 3.5 feet below Cut D, the bottoms of both of which are still in the oxidized zone. Panning estimates of samples taken in the bottom of these pits were six pounds per ton. Pits 2 and 3, (location shown on Plate 2), were sunk 4 and 3.5 feet, respectively, below Cut D. Samples were taken in the bottom of these pits which are in an oxidized, highly altered, bluish gray andesite, the value of which was six and four pounds per ton, respectively.

Drill holes 18, 19, 20, the location of which is shown on Plate 2, the depth being 52.3, 140 and 130 feet with inclinations, of 45, 60 and 75, from the horizontal, respectively, were drilled S. 8 degrees E. across Cut D, passing directly under the East end of Pit 2-13, 35 and 75 feet, respectively,

vertically below the south side of said pit. All of these holes showed mineralization to the extent of 4 to 7 pounds per ton for a width of 15 feet to a depth of 75 feet; vertically below bottom of Cut D in hole 20, the location and values of samples taken are shown on Plate 3.

Drill holes 21 and 22, located 25 feet N. 12 degrees E. of hole No. 20, as shown on Plate 2, the depth of which are 124.3 and 90.3 feet, with inclinations of 64 degrees and 49 degrees from the horizontal, respectively, were drilled S. 23 degrees E. across Cut D, passing under the center of Pit No. 1 and vertically below the south side of said pit. Both of the holes show mineralization to the extent of 2 to 5 pounds for a width of 15 feet to a depth of 85 feet, vertically below floor of Cut D. These two series of holes prove a body of low grade commercial ore 25 feet, the distance between the two series, in length, 15 feet in width and 80 feet in depth in one instance, as shown on Plates 4 and 5.

A tunnel will be driven as soon as weather permits to get beneath these ore zones at approximately 100 feet below the present floor of Cut D.

Drill holes 23 and 24, shown on Plate 2, are located 32 feet N. 20 degrees E. from hole 22, and were drilled at inclinations of 45 degrees and 60 degrees from the horizontal, respectively, S. 55 degrees E. across Cut D. While no commercial ore was encountered, the strong indications of cinnabar by the values of the samples panned, indicate that the mineralized zone is persistent, but barren of commercial ore, at this point along the line the holes cross-sectioned. However, the surface samples taken in Cut D showed low grade commercial ore vertically above these holes.

Holes 15, 16 and 17 were drilled, the location, direction, inclinations and depths of which are shown on Plate 2. None of these holes encountered cinnabar due to the fact that it has since been proven the ore-bearing fractures dip in a northerly direction, and as the holes were driven in a northeast direction, the holes passed under the mineralized zones.

Angle holes will be drilled to cut mineralization exposed in Pit 4 and the mineralized area in Cut F. All holes will be drilled along a line N. 62 degrees E. from Hole No. 24 every 100 feet with the view of proving the continuity length of commercial ore to be greater than has been proven by the holes drilled to date.

Cut G, length 550 feet, width 10 to 11 feet, depth 5 to 22 feet, located 500 feet N. 62 degrees E. of Cut D on the New Era Claim, was driven N. 40 degrees W. (as shown on Platel), across the same fault fracture as encountered in Cut D, upon which all the development described has been done. Another more or less parallel fracture 100 feet in width was cut 50 feet S. 40 degrees E. from the main N. 62 degrees E. fracture, separated from it by a dark gray andesitic dike. Commercial ore was encountered in both of these fractures, the location and value of which is shown on Plate 1. One five-foot sample of a greyish clay gouge, showing cinnabar in the last mentioned fracture, assayed 8.4 pounds per ton. This development seems to prove the continuity of the mineralized fracture 500 feet further east than Cut A. Both of these mineralized fractures in Cut G will be drilled as soon as the drill-hole development is completed in Cut D.

Exhibit J pp. 18-19

Cut E, length 200 feet, width 10 to 11 feet, depth 2 to 3 feet, was driven S. 40 degrees W. about 350 feet N. 62 degrees E. of Cut G. On account of excessive water, the rock in place was not reached. Therefore, it is not positively known whether the mineralized zone encountered in Cuts F, C, A and G extends this far past or not. A shaft will be sunk in this cut as soon as weather permits, to prove or disprove the existence of the major fault fracture as far east as this cut.

This is the extent of the development on the Johnson Creek Mine Fracture trending N. 62 degrees E.

Cut B, length 350 feet, width 10 to 11 feet, depth 3 to 12 feet, 250 feet S. 50 degrees E. of Cut D on the Bonanza Claim, the location of which is shown on Plate 1, was driven S. 35 degrees E. across a fracture parallel to the one previously discussed. This cut penetrated the oxidized andesite country rock about 3 feet, while traces of cinnabar were indicated in the pannings at various places, no cinnabar of commercial grade was encountered.

The Northerly extension of the Swamp Vein of the Mother Lode Mine is most likely what is known as the Greenback Vein on the Consolidated Quicksilver Company's holdings. This vein trending N. 12 degrees E. and dipping about 80 degrees S. was opened up by 5 surface trenches for a distance of 600 feet, thus proving the continuity of the vein on the surface for at least that distance from the development to date. The vein varied in width from 3 to 5 feet, and in value from 2 to 10.6 pounds per ton, the location

and value of which are shown on Plate 1, the cinnabar being impregnated in a yellowish white to bluish clay gouge in a fracture in the highly altered oxidized andesite country rock. This vein will be prospected in depth by drill holes, particularly beneath the sample which assayed 10.6 pounds per ton.

Pits have been sunk on what is presumed to be the Champion vein on the Company's holdings in various places,but no development has yet been performed.

SUMMARY

Cut A - 350 ft. in length	Bonanza Claim	600 cu. yds.
" B - 350 " " "	" "	450 cu. yds.
" C - 350 " " "	" "	350 cu. yds.
" D - 250 " " "	" "	3100 cu. yds.
" E - 200 " " "	Happy Chance	100 cu. yds.
" F - 550 " " "	Bonanza Claim	550 cu. yds.
" G - 550 " " "	New Era Claim	2500 cu. yds.
	TOTAL - - - - - - - - - - - -	7650 cu. yds.

DRILL HOLES	DEPTH
14	102.0'
15	145.5'
16	69.0'
17	152.5'
18	53.5'
19	139.0'
20	130.5'
21	124.3'
22	90.3'
23	167.2'
24	180.0'
25	63.9'
26	81.0'
TOTAL - - - - -	1498.7'

TRENCH	GREENBACK	LENGTH
1	"	15'
2	"	10'
3	"	30'
4	"	35'
5	"	75'
6	"	30'
		50'

35 pits and postholes average depth 6 feet equal 210 feet on Greenback, Commodore and Bonanza Claims.

The previously described work is the extent of the development to date.

RECOMMENDED DEVELOPMENT

While the probable ore developed by the exploratory work to date is sufficient for a year's operation of a 50-ton reduction plant, the following exploratory work is necessary to be performed to assure the continuous operation of the property:

Location	Number Drill Holes	Total Footage	Cost Per Foot	Total Amount
Pit No. 4	3	300	$2.50	$750.00
Cut F	3	300	2.50	750.00
100' East Hole #23	3	300	2.50	750.00
200' East Hole #23	3	300	2.50	750.00
Cut G	6	600	2.50	1500.00
100' West Cut G	3	300	2.50	750.00
200' West Cut G	3	300	2.50	750.00
100' East Cut G	3	300	2.50	750.00
200' East Cut G	3	300	2.50	750.00
Greenback Clain	10	1000	2.50	2500.00
TOTAL	40	4000	25.00	10000.00

On thousand feet Mine Development @$10 per ft.	$10,000.00
Bulldozer excavations for 24 days @$32 per day	768.00
Equipment, Compressor, Jack-hammers, etc.	4,232.00
TOTAL	$25,000.00

This program of drilling and tunnel exploratory work, drifts, cross-cuts, raises, etc., is subject to change as work progresses, depend-

ing upon results obtained. The cost of mining and plant operation should not exceed $4.00 per ton.

SAMPLING

Samples were taken in the dozer cuts A, C, F and G, by cutting a trench 2 to 3 inches in width and depth, respectively, in the center of the bottom of the cut, at 5-foot intervals. In Cut D, the trenches were cut across and up and down the cut at the same intervals. The location and values of samples taken are shown on Plates 2 and 5. These samples were panned, and values listed are panning estimates. Check assays were made frequently to ascertain and assure accuracy of these pannings.

In sampling the drill-holes, the wash water or sludge was saved and combined with the cuttings recovered in the upside down core barrel; the samples thus obtained from each run were panned to determine the value of the material passed through.

The lengths of the runs vary and the location and values of samples taken are shown on Plates 3 and 4. Portions of some of the sludge samples have been bottled and kept to be assayed. The core recovered has been carefully arranged in core-boxes and racked for future reference.

ORE RESERVES

The results of the development obtained to date by the dozer-cuts and drill-holes have proved a probable block of ore, shown on Plate 5, 285 feet in length on the surface (the distance between Cut F and a point 100 feet East of Cut A), and 25 feet in length (the distance between the bottom of the

two series of holes 18, 19, 20, 21 and 22, for an average length of 155 feet, 18 feet in width (the average width of commercial ore 20 feet on the surface, 16 feet at the bottom of holes 20, 21, and 80 feet depth (average depths of commercial ore encountered by holes 20 and 21, 75 and 85 feet, respectively).

Thus a block of ore $\frac{155 \times 18 \times 80}{12}$ = 18,600 tons, having a value of 5.2 pounds per ton (the average value of the samples taken).

The cubical contents of one ton of ore has been considered 12 cubic feet for this calculation.

SUMMARY AND CONCLUSIONS

The following facts are to be considered:

Climatic and economic conditions are favorable for continuous operation the entire year and for low operating cost.

The geologic conditions are favorable for the deposition of quicksilver. The Company's holdings are located in a recognized mineralized area, in one of the major fault fractures trending N. 62 degrees E. from which an appreciable amount of quicksilver has been produced. Furthermore, the property is situated between the Mother Lode and Johnson Creek Mines, which have been the most productive mines along this fault fracture.

At least 3 mineralized (cinnabar-bearing) veins or fractures are known to traverse the property. Two of these, the Swamp and Champion veins from which the major productions of the Mother Lode Mine has been derived, have to date only been prospected by surface trenches, cuts, pits and short tunnel (a sample from which assayed 10.6 pounds per ton), to prove

the existence of these veins on this property.

A meagre amount of development (dozer-cuts and drill-hole exploration) or the third of Johnson Creek Mine Fracture has resulted in the development to date of a probable tonnage of 18,600 tons, having a value of 5.2 pounds per ton. While to date, only ore of a low commercial grade has been encountered the history of the other mines in the district has been, where this main fracture is intersected by cross-fractures, particularly those trending N. 12 degrees E., a good grade of and even high grade ore has been encountered. It is to be expected when the tunnel to be driven gets beneath the area reached by drill-holes 18, 19, 20, 21 and 22, that such intersections will have been encountered, which will open up ore of a much higher grade than heretofore has been exposed.

In view of the above facts, further development of the property to the extent recommended in body of report is warranted, with the confident expectation that positive ore of sufficient tonnage will be developed to keep the property in continuous operation.

Very respectfully submitted,

(Sgd) George C. Hogg

MINING CLAIMANT'S EXHIBIT L

Portland, Oregon,
November 6, 1932.

Mr. George Dreis,
Yeon Building,
Portland, Oregon.

Dear Sir:

In compliance with your request, I have made and completed a study of the property owned by the Independent Quicksilver Co. As my instructions were to examine this mining ground from a geological viewpoint with special emphasis on the ore occurrence, manner in which it was formed, and recommendations as to future prospecting, I have refrained from sampling and estimating quantities of low grade material now in sight. It is my opinion that any ore now developed on the property is of little consequence with the price of quicksilver below fifty dollars per flask of seventy-six pounds, therefore it is of the greatest importance to locate higher grade ore by systematic prospecting of favorable areas.

Your property consists of twenty-two mining locations unpatented, containing approximately four hundred and forty acres, within the boundaries of the Ochoco National Forest, Location 20, Township 14 South; Range 20 East. The elevation is about 6,000 feet, with considerable snowfall during the winter months, but mining operations can be carried on twelve months of the year. It is reached from Prineville via the Ochoco Highway twenty-six miles and thence nine miles along the Johnson Creek Highway, which is usually in excellent condition for heavy hauling. There is sufficient timber on the property for all mining purposes, and abundance of water during all seasons. Adjacent on the south lie the holdings of the Consolidated Mining Company, where the mining of cinnabar has continued more or less continuously for thirty years with possibilities as yet unexhausted and little depth attained. To the North lies the Number One Mining Co., Western Resources (Blue Ridge), Johnson Creek Mining Co., and several other rather promising prospects. As the belt of cinnabar mineralization extends north and south, it can be stated that the location of this property is very favorable for the occurrence of ore bodies.

In this district the country rock is of volcanic origin which can be classified as an andesite flow probably having walled up through vents along an axis approximately North 35 degrees West. Traversing this formation in various directions are fissures, intrusive dikes, and simple fractures, all belonging to a younger geological period of time. There has been found no evidence of cinnabar impregnation along the axis North 35 degrees West.

The most important fracturing of the country rock on the property is along a line approximately North 62 degrees East. These fractures occur in a parallel series, spaced from a few feet apart to hundreds of feet. For the most part they are filled with igneous material and can be termed dikes. These dikes are andesite also but being somewhat more crystalline, can be distinguished from the country rock through which they have penetrated. In width they vary from a few inches up to a hundred feet or more. There they cross the earlier fissures of the North 35 degrees West series, there is seemingly no displacement or faulting which is quite important to know. These dikes (N 62 degrees East) at their walls, show no fusion with the country rock through which they penetrated, indicating that at the time they were intruded, the country rock had cooled down, and that a long period of time had elapsed. There is evidence of contact metamorphism, far beyond the walls of the dikes for many feet the andesite country rock is considerably altered, the original compounds of which it was composed having broken down chemically into secondary compounds, a reaction caused by the heat from the intruding material of the dike and other agencies too complex to discuss here and having no bearing on the problem of finding ore. Suffice it to say that this altered andesite near the dike walls is in a condition by reason of this alteration, for mineral impregnation or for leaching by acid solutions and the consequent replacement of basic material by mineral held in the attacking solutions. Had there been no further activity in the district by chemical or igneous agencies, no ore bodies would have been formed. The situation would have been similar to a garden prepared for planting but before the seed had been placed in the ground. All conditions would be favorable but no crop would ensue.

Fortunately, nature did not stop her gardening at this point. Ages later the crust of the earth was broken once more, this time on an axis north and south (approximately North 11 degrees East). This action was probably about the time of the Cascade Mountain Uplift. This interesting period in the geological history of the Pacific Coast is outside our discussion except that the fracturing is extensive and occurred at a very much later date than the systems previously mentioned. These fissures are represented in the district by dikes running north and south, and sometimes merely by cracks in the country rock hardly noticeable. As they cross the dikes having a course North 62 degrees East, and also the ones having a course North 35 degrees West, they must necessarily be younger. The importance to our discussion lies in the fact that along this course north and south for a great many miles

there is a belt of mineralization with producing quicksilver mines and prospects lining up with remarkable accuracy. It is very probable that these north and south fractures are the channels through which quicksilver minerals in vapor or solution sought to reach the surface from a deep seated source, and that this mineralizing action occurred in comparatively recent times. Where these fissures are filled with intruded lava, there is evidence of contact metamorphism along the walls extending from a few to many feet into the country rock, gradually fading out into unaltered material as distance increases from the dike.

To complete the story of ore genesis, the evidence indicates that the aqueous solutions carrying quicksilver rising through north and south vents, impregnated the altered andesite adjacent to the dikes north and south, and where these dikes intersected other dikes running North 62 degrees East, the solutions worked along their walls also impregnating the altered andesite adjacent to their walls. It is apparent that if the spacing apart of these north and south fissures is sufficiently close, there could be almost continuous ore formed along the walls of the east and west dikes (North 62 East). Also, that if the north and south ore channels are not dike filled but simple fractures or knife blade seams, there would be no altered andesite along their walls and consequently no impregnation and no ore bodies formed, in which case the ore would be formed only along the walls of the east and west dikes which the north and south ore channels intersected. This indeed is borne out by the evidence. Some ore bodies in the district follow one course and some the other. On the property of the Independent Mining Company prospecting has been conducted at numerous spots over a large area by surface panning, opencuts and short tunnels. In the main, this work has not been productive of results. It is my opinion that most of this work was done in altered andesite at too great a distance from intersections of the two systems of fracturing, their importance not being recognized. Also, since there must have been considerable dilution of an ore body near the surface by reason of erosion and the covering by overburden, the shallowness of recent prospecting would have prevented the discovery of important ore. The surface panning does indicate one very gratifying fact which is that cinnabar is present; also, since the areas of heaviest pannings follow roughly a north and south line, and there are at least two such lines crossing the property, it is apparent that the property is crossed by at least two of the main ore carrying channels previously discussed. It is along these lines that prospecting should be continued, with particular attention given to these points where these lines cross known east and west dikes. One of these north and south lines of mineralization extends from the southeast corner of the Bonanza claim, crossing the New Era, Happy Chance, Ruby, New Crystal, Prospect and Aetna claims. Another north and south line crosses the property, starting about two hundred feet east of the southwest corner of the Bonanza claim, crosses the Zero claim near the Hunsaker tunnel and shaft, Good Luck, Grubstake, Crystal, Prospect, Ajax and Aetna. To the south, on the property of the Consolidated Mining Company, these lines extended would hit very close to known ore bodies there.

On the Greenback claim there is a tunnel driven 204 feet southeast. I can see no object in extending this further, as ahead of the face there is no known mineralization at present to drive for. However, fifty feet in from the portal, a very well defined fissure crosses the tunnel on a course of North 11 degrees East. This fissure may turn out to be of great importance in developing ore at points where it crosses east and west dikes on both the Greenback and Lost Mine claims. A fourth fissure or series of fissures on a north and south line crosses the Cornucopia, Aztec and Jewel claims but very little is known about this except for some scattered pannings that look interesting.

I have attempted to discuss the genesis of ore in the district in a manner understandable by a layman, with the hope of bringing out essential points governing future prospecting. It is not claimed that the whole history of the ore occurrence is disclosed for there are many perplexing problems remaining to solve. It now is necessary to sum up our exact knowledge, as follows:-

CONCLUSIONS:

1. The geological conditions are present on this property which formed commercial cinnabar ore on nearby properties.

2. Failure to date in locating ore on independent ground is attributable to lack of knowledge of ore genesis, too unaltered prospecting, and the lack of a well defined policy and program.

3. Methods of prospecting were too slow.

4. Dikes both north, south, east and west traverse the property having altered andesite country rock on both walls favorable for impregnation by cinnabar or replacement. Points of intersection of these two series are likely ore zones and prospecting should be confined to these areas.

5. Pannings of surface soil or near the surface proves the presence of cinnabar. In some areas on the property such tests are almost rich enough to prove ore. There can be no doubt that ore channels traverse the property. It only remains to determine whether or not mineralizing activity has been sufficiently intense to make bodies of commercial ore.

6. It is my opinion that a surface capping to trap ascending vapors of quicksilver is not essential to the formation of cinnabar ore bodies in this district. There is definite evidence that aqueous solutions carrying quicksilver percolated freely through the formation and I believe the altered andesite adjacent to the dike walls would readily receive these solutions and be converted into ore by them.

7. It is very probable that the depth to which workable ore extends vertically is limited only by the depth to which surface waters penetrated before being converted into ascending solutions, carrying mineral from heat and mineral encountered. In a crust fractured so extensively, fifteen hundred feet is a reasonable expectancy.

8. Horizontally, ore bodies should have considerable length but this would depend on the spacing apart of cross fractures feeding them. It is probable that at some points ore when found will extend north and south as well as east and west, but this will be possibly only where there is dike filling in both series of fissures.

9. The surface values being diluted from erosion and mixed with overburden cannot, if unsatisfactory, prove the absence of important ore below the zone of such disturbances. Possibly core-drilling at favorable points is the quickest and best method to prospect this ground, each hole designed to disclose the formation at a depth not less than thirty feet below the surface.

It is my opinion that $5,000.00 should be expended on this property to locate commercial ore. I judge the present indications of ore sufficiently attractive to warrant this expenditure. A program of development beyond this cannot be formulated now, as it will depend entirely on results obtained. A program of core-drilling for the spring of 1933, confined to the most favorable spots can be completed in a moderate way for this sum. The exact location of holes to be drilled cannot be stated at this time as considerable surface panning and analysis of the dike systems must be done first, in order to have drilling footage.

I wish to acknowledge the survey and mapping of geological features of the property by A. J. Hofmann which have been of great value to me.

Respectfully submitted,

(Sgd) H. F. BYRAM

MINING CLAIMANT'S EXHIBIT O

June 29, 1955

Mr. George Dreis
N. E. 37th Street
Portland, Oregon

Dear Sir:

1. I visited the Independent Quicksilver Company's property June 27 and returned June 28, as you said it was important that you had my report as soon as possible.

2. I found that all the recommendations in my report of May 15, 1942 had been completed.

3. The Nicols Tunnel was driven about 90 ft. and the overburden was about 1000 cu. yds. excavated by bulldozer. This tunnel was driven on the vein system of the Mother Lode property.

4. To explore the possibilities of the Independent property a tunnel should be driven from the falls north of the cabin to cut the talc or swamp vein opened by dozer excavation completed in 1941. This tunnel will encounter vein about 50 ft. under the vein exposed, then a crosscut should be driven east to cut the Onka vein and the mineralization in the Morris Tunnel. Hole #1 was drilled on the Onka vein in the fracture zone which assayed 8.6 lbs. This drill hole was logged and merchantable ore was encountered, also a crosscut was driven to get beneath the drill holes drilled in 1941, and some of the holes showed merchantable ore. This exploratory work indicates that the independent property is on the Johnson Creek fracture. This leads to the conclusion that the two systems of veins pass through the Independent property which should enhance the value of the Independent Company's property.

5. See U.S.G.S. Reconnassance survey of 1947 and subsequent dates.

(SGD) George C. Hogg
George C. Hogg

MINING CLAIMANT'S EXHIBIT P

GEORGE C. HOGG
Consulting Mining and Civil Engineer
229 Lumbermens Bldg.
Portland, Oregon

October 29, 1930

Mr. Wm. T. Conlin, President
Independent Quicksilver Co.
801 Yeon Building
Portland, Oregon

Dear Sir:

I herewith submit preliminary report of the Independent Quicksilver Co's property, which has been written in duplicate, one original and one copy. A contour and geological map to accompany report has been delivered to you.

I am in no way financially interested in the Independent Quicksilver Company.

Yours very truly,

(Sgd) George C. Hogg

PRELIMINARY REPORT

The Independent Quick Silver Company property is located in Sections 17 and 20 Twp. 14 S. Range 20 E. Willamette W.M. Ochoco National Forest Reserve, Crook County, Oregon, in a recognized mineral district in which Cinnabar is the predominating mineral in this particular locality.

The discovery of Cinnabar within the last year in numerous places has caused considerable attention to be given to the district with the result that mining claims have been taken up for miles. In fact, there is very little ground open for location.

The Independent Quick Silver Company holdings (consist of 13 mining claims, approximately 250 acres) are ideally located in so much as the holdings join the Consolidated Quick Silver Mining Co. property on the north and are one mile southwest of the Johnson Creek Mercury Co. property.

The Consolidated Quick Silver Mining Co. has carried on over 2000 ft. of development and considerable ore has been blocked out. There is a 20 ton rotary furnace on this property, and considerable mercury has been produced.

The Johnson Creek Mercury Co. has carried on an extensive development program this summer and fall and considerable ore has been blocked out. A Hobson 5 ton retort has been in operation the last few months and some mercury has been produced. This company is in the process of installing a

6 tube D Retort to treat the high grade ore, and will be ready for operation within the next few months.

While only a limited amount of development has been carried on at most of the other claims in the district many of them have made especially good showing.

To date the development carried at the Independent Quick Silver Co. property is very limited in extent, mostly in the nature of location work, except a new tunnel on the Zero claim, which has been driven a distance of 25 ft. in the decomposed gray porphyry. Stringers of Cinnabar thruout the decomposed porphyry were encountered 20 ft. from the portal of the tunnel. Sample #12 was taken in the face of the tunnel. This tunnel is being driven at present.

A shaft was sunk on the Bonanza claim to a depth of 10 ft. Pan tests were made of the material taken out of the bottom of the shaft which showed appreciable Cinnabar. Sample #10 was taken from the bottom of the shaft. This shaft could be sunk 25 ft. deeper.

The old tunnel on the Greenback Claim was cleaned out. This tunnel has not been driven far enough east as yet to encounter the vein.

A test pit was sunk on the Greenback claim to a depth of 4 ft. The work being discontinued on account of excessive water. Pan tests of the material in the bottom of the pit showed appreciable Cinnabar. Sample #10 was taken in the bottom of this pit. Arrangements should be made to take

care of the water and this pit could be sunk 10 ft. deeper.

RECOMMENDATIONS

1. Advancing new tunnel on the Zero claim thru the decomposed gray prophyry dike as long as the dike carries Cinnabar.

2. Sinking of pit on the Greenback Claim until the vein is encountered in place. If results are favorable as far as encountering Cinnabar is concerned, then the old caved tunnel 75 ft. west of the pit should be cleaned out and the tunnel driven east to encounter the vein exposed in the pit. When the vein is encountered in the tunnel the vein should be drifted on north and south.

3. Test holes should be sunk along the creek on the Lost Mine claim to locate the vein encountered in the pit on the Greenback claim on its southerly extension.

4. Cleaning out of old tunnel on the Columbia claim and drifting both north and south on the vein, which report has it, is in the face of the tunnel.

5. Sinking of shaft on the Bonanza claim 25 ft. deeper.

6. Trenching on surface from andesite outcrop to porphyry with the idea of encountering a vein on the contact of prophyry and andesite.

CONCLUSION

The following facts should be considered:

1. The Independent Quick Silver Co. property is located in a

recognized mineral district, this particular locality predominating in quick silver.

2. The Independent Quick Silver Co. property adjoins the Consolidated Quick Silver Co. property on the south and is about 1 mile southwest of the Johnson Creek Mercury Co property, both of which have produced and will produce considerable quick silver.

3. Geologic conditions are favorable for the deposition of quick silver. The predominating formation being andesite and prophyry. The same formation exists on both the Consolidated Quick Silver Co. and the Johnson Creek Mercury Co. properties.

4. The economic and climatic conditions are favorable for cheap mining and continuous operations for the entire year.

5. The limited amount of development to date on the Independent Quick Silver Co. property has resulted in the encountering of Cinnabar in three places.

6. The price of mercury for the last four years have been in excess of $1.40 per pound, and the indications are that this price will at least be maintained in the future, as the production in the United States is only about one-third of the actual consumption, and the demand for the metal is steadily increasing.

Based upon the significance of the above facts, the further development of the Independent Quick Silver Co. property to the extent of

$25,000 is surely justified with the confident expectation that a producing Quick Silver property will be the result.

Respectfully submitted,

(Sgd) George C. Hogg

George C. Hogg

Consulting Engineer

Portland, Oregon, October 29, 1930

MINING SEMINAR'S EXHIBIT

RESUME OF ASSAYS, INDEPENDENT QUICKSILVER CO.

Date	Sample No.	Location	Lab. No.	Tested By	%Hg	Lbs./Ton
6/30/31	1	East end of 7-1/2' trench east of andesite in #2	.....	A.J.Hofmann	0.095	
"	2	Soft streak of outcrop, 30" width; #3 west	.....	do	0.2	
"	3	Taken from contact of andesite & porphory. This is outcrop. #2 West Side	.....	do	0.098	
"	4	#4 Cut Good Luck	.....	do	0.197	
"	5	Crushed rock porphory	.....	do	Blank	
"	6	Altered andesite trench. East	.....	do	0.096	
7/3/31	7	Crushed porphyry, West trench	.....	A.J.Hofmann	Blank	
"	8	Broken down andesite, East trench	.....	do	0.04	
7/8/31	9	Drain pit	.....	A.J.Hofmann	0.4	
"	10	40' so. of no. end of long trench on porphyry cross dyke	.....	do	0.2	
"	13	From fissure in close end trench	.....	do	0.1	
"	15	Right side of Columbia tunnel	.....	do	0.2	
7/9/31	11	Nichols last digging	.....	A.J.Hofmann	0.1	
"	12	Honsaker tunnel	.....	do	0.1	
"	14	Left side Columbia tunnel	.....	do	0.1	
7/15/31	16	Auger hole in trench	.....	A.J.Hofmann	0.36	
"	17	Porphyry-andesite contact in trench	.....	do	0.64	
"	18	Crystal claim, bottom of hole	.....	do	0.6	
"	19	" " top of outcrop	.....	do	0.4	
"	21	Pioneer claim, drill hole ("Laurgaard)	.....	do	0.1	
"	22	" " blast hole (test Hole")	.....	do	0.2	
"	20	Crystal claim, special sample	.....	do	0.4	
"	23	Auger hole	.....	do	Blank	
7/24/31	24	Red blanket vein between andesite dykes	.....	A.J.Hofmann	0.24	
"	25	Next to andesite intrusion in trench	.....	do	0.26	
"	26	Along southern wall between andesite dykes (Black ore)	.....	do	0.2	
"	27	Next to porphyry dyke in trench	.....	do	0.26	
"	28	Along northern end of trench between porph.	.....	do	Blank	
"	29	Drain trench, r.h. drift, 3' between two				

Date	Sample No.	Location	Lab.No.	Tested By	%Hg	Lbs./Ton
7/29/31	16a	Auger hole	.....	A.J.Hofmann	0.2	
"	30	Extreme north end of Trench #1, bottom cut 6' long (where highgrade was found)	.....	do	0.4	
"	31	Crystal claim, slant hole, 13' in	.....	do	0.2	
"	32	" " 9' down vertical	.....	do	0.28	
"	32a	" " 18' down vertical (5' water)	.....	do	0.16	
"	33	Columbia tunnel, "Gouge streak center"	.....	do	0.32	
"	34	" " footwall	.....	do	0.7	
"	35a	Auger hole, Bonanza claim	.....	do	0.24	
"	35b	" " " "	.....	do	0.24	
"	35c	" " " "	.....	do	0.16	
"	35d	" " " "	.....	do	0.36	
7/30/31	36	Crystal trench	.....	A.J.Hofmann	0.2	
"	36a	" "	.....	do	0.2	
8/7/31	35e	#4 trench near aspens, 15' long, 2-1/2' deep	.....	A.J.Hofmann	0.16	
"	36	Crystal trench 35' from stump	.....	do	0.2	
"	37	#3 trench, lower meadow	.....	do	0.12	
"	38	#1 trench, North end	.....	do	0.12	
"	39	Columbia dump	.....	do	0.2	
"	....	Commodore Frank's claim	.....	do	0.16	
8/28/31	40	Greenback claim, yellow mud between red clay streaks	1	A.J.Hofmann	0.07	
"	"	Northerly end trench, Greenback claim	2	do	0.08	
"	"	No. 1 C bottom trench, Greenback, red clay	3	do	0.08	
"	"	Bottom trench, Greenback, under red clay	4	do	0.04	
"	41	No. 3 trench, lower meadow southerly end, auger hole 15' deep	5	do	0.09	
"	49	#4 trench, easterly end	.....	do	0.09	
"	50	" " 40' from juniper tree north	.....	do	0.07	
"	51	Greenback tunnel, 2' from footwall, 8' high, 2' wide	.....	do	0.08	
"	52	Greenback tunnel, footwall, 3' wide, 3'deep	.....	do	0.06	

Date	Sample No.	Location	Lab.No.	Tested by	%Hg	Lbs./Ton
8/28/31	53	#3 Trench 50' back of face 7' deep	.....	A.J.Hofmann	0.07	
"	54	" " face 9' down	.....	do	0.05	
"	55	Greenback claim, northeast corner of pit	.....	do	0.09	
"	56	#4 trench, extreme s.e. end of trench near aspens, 3' down	.....	do	0.09	
8/31/31	57	#1 trench red streak	.....	A.J.Hofmann	0.12	
"	58	#4 trench, s.e. end, auger hole 7' deep	.....	do	0.08	
"	38?	#1 trench, northerly end, 7' down (recheck)	.....	do	0.11	
"		Grubstake trench, Laurgaard special	.....	do	0.06	
"		#16 Cut, auger hole	.....	do	0.05	
9/22/31	100	Greenback #1 trench, horizontal hole	.....	A.J.Hofmann	0.05	
"	101	Greenback #1 trench, footwall	.....	do	0.02	
"	102	" " " hole with white streaks	.....	do	0.09	
"	103	" #2 " 2d sample	.....	do	0.06	
"	104	" " " 1st sample	.....	do	0.10	
"	105	" #1 trench, footwall	.....	do	0.04	
"	106	Crystal claim, northeast end of outcrop	.....	do	0.08	
"	107	" " trench on top of "green rock"	.....	do	0.12	
"	108	Zero shaft	.....	do	0.08	
"	109	Hunsaker tunnel, face	.....	do	0.11	
"	110	" " red streak	.....	do	0.09	
"	111	Columbia tunnel, face	.....	do	0.06	
10/2/31	119	Crystal claim, mystery hole	.....	A.J.Hofmann	0.02	
"	120	" " northeast end of outcrop	.....	do	0.11	
"	121	Red conglomerate east of Lost Mine	.....	do	0.09	
"	122	Greenback tunnel Station No. 1	.....	do	0.12	
....	112	30' west of conglomerate, Lost Mine claim	.....	A.J.Hofmann	0.06	
....	113	Crystal claim float	.....	do	0.14	
....	114	Outcrop, west end, Crystal Claim	.....	do	0.07	
....	115	Columbia footwall, north drift	.....	do	0.07	
....	116	Columbia hanging wall, north drift	.....	do	0.05	
....	117	Columbia cross cut 6' from timbers	.....	do	0.06	
....	118	Lost Mine Claim 50' west of conglomerate	.....	do	0.09	
10/12/31	509	Greenback tunnel face	.....	A.J.Hofmann	0.08	

Date	Sample No.	Location	Lab.No.	Tested By	%hg	Lbs./Ton
10/12/31	510	Greenback tunnel, feeder back from face	.....	A.J.Hofmann	0.07	
"	511	" " Pink streak	.....	do	0.07	
"	512	" " mud slip in face	.....	do	0.06	
"	513	" " hard rock	.....	do	0.05	
"	514	" " bottom of crosscut in face	.....	do	0.06	
"	515	" " new vein cut 10/10/31	.....	do	0.06	
"	123	Ruby Gulch on surface	.....	do	0.08	
"	124	Hole 200' west of tunnel	.....	do	0.04	
11/10/31	128	Princess claim, white streak	.....	A.J.Hofmann	0.04	
"	129	Cosmopolitan cinch hole	.....	do	0.08	
"	130	Gravel under white streak, Princess claim	.....	do	0.10	
"	131	Princess Claim, cinch hole	.....	do	0.05	
"	132	Mud streak under white streak and gravel, Princess claim	.....	do	0.09	
"	133	Prospect badger hole	.....	do	0.02	
5/10/51	...	Mole hole on Goodluck claim	.....	A.J.Hofmann	0.10	2.0
"	...	Cornucopia claim cinch hole	.....	do	0.05	1.0
"	...	Aetna claim cinch hole	.....	do	0.10	2.0
"	...	Ajax claim cinch hole	.....	do	0.70	1.4
"	...	Aztec claim cinch hole	.....	do	0.2	4.0
"	...	Crystal claim, face of portal	.....	do	0.06	1.2
"	...	" " top of hill	.....	do	0.07	1.4
"	...	" " south contact	.....	do	0.09	1.8
"	...	" " north contact	.....	do	0.07	1.4
"	...	Jewel claim cinch hole	.....	do	0.03	0.6
"	...	" " up draw from cinch hole	.....	do	0.06	1.2
"	...	" " 35' southeast of cinch hole	.....	do	0.07	1.4
8/22/31	40-1	Check	31187	E.W.Lazell	0.09	
"	40-2	Check	31188	do	None	
"	40-3	Check	31189	do	None	
"	40-4	Check	31190	do	0.18	
"	41	Check	31191	do	0.36	
9/11/31	...	No description (Assayed 0.02 oz. gold)	313773	E.W.Lazell	0.02	

Date	Sample No.	Location	Lab.No.	Tested By	%Hg	Lbs./Ton
10/7/39	1	Ontka tunnel (the present July Cut #2, BJA)	355	N.W.TestingLab.	0.52	10.4
"	2	Meadow	356	do	0.43	8.6
5/6/40	1	Pit No. 1, grab sample from dump	633	N.W.TestingLab.	...	2.0
"	2	Pit No. 4, grab sample from dump	633	do	...	2.0
"	3	Cut G	633	do	...	1.9
"	4	Cut D, grab sample from dump	633	do	...	Trace
"	5	Pit No. 1, hard rock from dump	633	do	...	Trace
12/31/46	1-a	No data	1987	N.W.TestingLab.	25.50	510.0
"	1-b	Duplicate of 1-a	1987	do	25.30	506.0
"	2	No data	1987	do	None	
12/23/46	1	No data	P-5587	Ore.Dept.of Geol.		0.6
"	2	No data	P-5588	do		239.2
7/22/47	...	Morris adit face	P-6310	Ore.Dept.of Geol.		0.6
11/18/47	1	No data (Morris adit?)	P-6772	do	...	2.0
"	2	No data (0.02 oz. gold per ton)	P-6773	do	...	0.4
9/21/48	1	No data (Morris adit?) Trace gold	P-7827	do	Slight trace	
"	2	No data	P-7828	do	Trace	
10/19/48	...	2nd hole, 84 ft. (July Cut No. 1?)	P-7949	do	Trace	
8/14/50	1	Gouge	P-10238	do	Nil	
"	2	Quartz vein with sulfides	P-10239	do	Trace	
10/16/51	1	1.8' x 0.2' x 0.1' channel across tight shear streak next to hangingwall intermixed with fine stringers of agate and hard gouge. (From pannings and from poorly sized reject from assayer would suggest re-analysis RJW) 660E-600S July Cut #1	35699	Abbot A,Hanks	Trace	
"	2	Same size channel five feet south from above on strike. Much agate and pyrite	35700	do	Trace	
"	3	1.2' x 0.2' x 0.1' five feet south of No. 2	35701	do	Nil	
"	4	1.0' x 0.2' x 0.1' five feet from #3, hard gouge	35702	do	Nil	
"	5	Random chip sample from n.w. wall July				

Date	Sample No.	Location	Lab.No.	Tested By	%Hg	Lbs./Ton
10/16/51	6	Random sample from soft yellowish-red gouge about 40' south of #4 near hanging wall on s.e. wall of July Cut #1 below small shaft	35704	Abbot A. Hanks	Nil	
"	7	Random sample from n.w. wall of July Cut #1 from Sample #5 south for about 20 ft.	35705	do	Nil	
11/1/51	1	Recheck of above using U.S.Bureau of Mines	35699	B.J.Westman		1.5
	2	distillation-titration method	35700	do		0.5
	3		35701	do		0.5
	4		35702	do		Nil
	5		35703	do		Nil
	6		35704	do		Trace
	7		35705	do		Trace
11/6/51	01-1	5.0' x 0.5' x 0.2' channel east from foot-wall contact in Oct. Cut No. 1. Decom-posed rock with gouge with considerable brown lime.		B.J.Westman		0.9
"	01-2	Same size channel east from above sample. Decomposed volcanics with much gouge and ochre		"		1.2
"	01-3	Same size channel east along cut from above. Much decomposed lime and agate; much iron and manganese oxides with some iron sulfide		"		1.6
"	01-4	Similar to above; same size channel. No iron sulfides and not as soft--more granular		"		14.3
"	01-5	Same size channel east of above along cut. Very granular with much lime and agate with ochre		"		Trace
"	01-6	Same size channel as above and east up cut. No hangingwall observed as cut not deep enough.		"		Trace

Date	Sample No.	Location	Lab. No.	Tested By	%Hg	Lbs./Ton
11/6/51	02-1	3.0' x 0.5' x 0.2' channel east from foot-wall contact in Oct. Cut No. 2. Similar to #01-1		B.J.Westman		Nil
"	02-2	Same size channel as 02-1 continuing up same cut. Decomposed volcanics with much ochre and agate. (This zone panned trace of gold)		"		Trace

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INDEPENDENT QUICK SILVER CO.

Claim	Original Locator	Witnesses	Date Recorded	Book	Page
Ajax	L. D. Johnson	R. W. Horn C. O. Thomas	May 7, 1932	5	230
Aztec	Elisha A. Baker	Geo. J. Dreis Wm. Cavanaugh	May 7, 1932	5	233
Columbia	A. Nichols	M. R. Elliott	Oct. 24, 1930	5	39
Cosmopolitan	R. W. Horn	R. W. Casebeer Edna L. Slocum	Dec. 1, 1931	5	208
Commodore	F. G. Johnson	A. J. Hofmann	Aug. 15, 1931	5	169
Cornucopia	R. B. Lippon	Geo. J. Dreis F. G. Johnson	May 7, 1932	5	233
Etha (Eatna)	A. J. Hofmann	F. G. Johnson Joseph Enginger, Jr.	May 7, 1932	5	232
Eastern Star	Mrs. F. G. Johnson	Gale Blackwell Cecil Bowlin	Dec. 1, 1931	5	209
Greenback	G. J. Dreis	F. H. DeFo	Oct. 14, 1930	5	31
Jewel	Elisha A. Baker	Geo. J. Dreis Wm. Cavanaugh	May 7, 1932	5	233
Lost Mine (Lost Claim)	Arthur C. Smith	E. J. Perkins	Oct. 14, 1930	5	32
Princess	Margaret A. Hofmann	G. J. Dreis R. B. Lippon	Dec. 1, 1931	5	210

of
INDEPENDENT QUICK SILVER CO.

Claim	Deeded by	Date Deeded to Independent Quick Silver Co.	Book	Page
Ajax	L. D. Johnson	Oct. 13, 1932	48	192
Aztec	E. A. Baker	June 27, 1932	48	162
Columbia	Ella Nichols A. L. Nichols	Nov. 3, 1930	47	491
Cosmopolitan	Doris A. Horn R. W. Horn	July 2, 1932	48	565
Commodore	F. G. Johnson F. W. Johnson	July 2, 1932	48	164
Cornucopia	R. B. Lippon	Unable to locate deed to Independent Quick Silver Co.		
Etha (Eatna)	Margaret Hoffman	July 2, 1932	48	167
Eastern Star	F. G. Johnson Mrs. F. G. Johnson	July 2, 1932	48	167
Greenback	Della Mae Dreis G. J. Dreis	Oct. 14, 1930	47	469
Jewel	E. A. Baker	June 27, 1932	48	162
Lost Claim	Arthur C. Smith Stella A. Smith	Dec. 3, 1930	47	506
Princess	A. J. Hoffman Margaret A. Hoffman	July 21, 1932	48	166

Claim	Original Locator (Rediscovered)	Witnesses	Date Recorded	Book	Page
Bohahza (Bononza)	William Thomas Conlin	C. Richards A. Nichols	July 26, 1929	4	510
Crystal	E. J. Perkins - by William Thomas Conlin	A. Conlin G. Richards	July 26, 1929	4	516
Grub Stake	W. J. Bishop - by William Thomas Conlin	R. Richards A. Nichols	July 26, 1929	4	508
Good Luck	Frank S. Johnson - by William Thomas Conlin	R. Richards A. Nichols	July 26, 1929	4	506
Happy Chance	Christian H. Paulsen - by William Thomas Conlin	R. Richards A. Nichols	July 26, 1929	4	517
Hen Era (New Era)	Mildred Russell - by William Thomas Conlin	G. Richards A. Nichols	July 26, 1929	4	504
Pioneer	Frank T. Collier - by William Thomas Conlin	G. Richards A. Nichols	July 26, 1929	4	513
Prospect	F. W. Peck - by William Thomas Conlin	A. Nichols G. Richards	July 26, 1929	4	514
Ruby	August Pautz - by William Thomas Conlin	G. Richards A. Nichols	July 26, 1929	4	511
Zero	A. E. Simmons - by William Thomas Conlin	G. Richards A. Nichols	July 26, 1929	4	507

The ten above mentioned claims were deeded to the Independent Quick Silver Company on the Seventh day of February 1930 and filed Eleventh day of February 1930 in book 47, page 321. These claims were also known as "The Portland Group" and " Consolidated Mining Co."

A power of attorney by said locators of above 10 mentioned claims was given to William Thomas Conlin and filed July 26, 1929 in book 47, page 200.

MINING CLAIMANT'S EXHIBIT V

BURTON J. WESTMAN, B.Sc.
Mining Geologist and Engineer

Member: American Institute of Mining and Metallurgical Engineers...
Western Mining Council

Beaverton, Oregon
October 11, 1951

Independent Quicksilver Co.
638 Park Building
Portland, Oregon

Attention: Mr. George J. Dreis

Subject: Investigation and Sampling in Section 20, T14S, R20E

Gentlemen:

For your records I should like to outline the results of the day spent on October 9, 1951 looking over the area southeast of your main camp more particularly in the new cut just west of the Morris adit as shown on the accompanying Figures 1 and 2.

In that diamond drilling was contemplated, the primary purpose of the visit to the property was to determine the best method of drilling in that I had previously questioned the advisability of diamond drilling such broken and decomposed ore material as had been encountered in the recent excavation. On the property, this contention was borne out in that the sheared ore zones could only be diamond cored with greatest difficulty then with high core loss plus high diamond loss per foot. A much more efficient far less costly method would be in wash boring. For shallow work a chopping bit on a wash pipe boring through 3-inch water pipe used as casing would be most effective; for deeper boring in the more consolidated rock below 20 ft., reverse circulation wash boring using a carbide-set hollow bit on AX casing used as the wash pipe boring through 2-1/2" water pipe casing. The former chops up the formation and washes out the sludge and fragments up to 1" in size; the latter method washes larger cuttings up through the wash pipe and frequently short sections of solid core. Both of these methods are very rapid in broken formation and more so in decomposed surface material. They

accomplish more than a churn drill in sticky formation besides having the advantage of boring at angles up to 50 degrees from the vertical.

The second purpose of the trip to the property was to check the area covered by the U. S. Geological Survey in 1947 as reported by C. D. Bath and K. L. Cook in their "Preliminary Report on a Geophysical Survey of a part of the Johnson Creek Area, Ochoco Quicksilver District, Oregon", 1949. While the report covered for the most part the results of a preliminary magnetic survey, the more interesting portion was the results of a natural-potential electrical survey conducted along Traverses 4E and 4E. This showed that there are definite indications of mineralization in the area just west of the Morris adit. The open cut made since then showed that this area is mineralized quite heavily in places with pyrite or marcasite which account for these electrical anomalies. A check, therefore, was made with a Fisher M-Scope mineral locator which, while limited in depth penetration of some 30 feet, has been found quite uncanny in locating shallow sulfide masses and this held true in and about the recent open cutting where very high anomalies were found extending to the southwest and west. Time did not permit extensive coverage of the area but it would be advisable before further open cutting is conducted.

Regarding the previous reports and investigations including the last one by the U. S. Geological Survey, I was surprised to learn that little or no significance was attached to the extensive springswhich occur in the area just west of the recent open cut work and trending up hill to the south. These springs indicate an immense fault or shear zone which, as far as I have been able to determine, has not been explored. Oddly enough, this zone of springs almost coincides with the inferred fault shown on the magnetic map Fig. 3 which accompanied the 1949 USGS report. Much subsurface structure can be obtained from such topographical features as draws, gullies, ridges, etc. which generally are the result of subsurface geology controlling the differential erosion which results in the present topography. This zone of springs, therefore, reflects a zone of weakness and in that cinnabar does occur in the surface material along the marshy slopes below these springs, I would assume that the cinnabar derived from this zone of weakness and should be prospected accordingly.

That considerable faulting has occured in the area round the new cut was very evident on examining the material exposed in the Cut. All of the rock is more or less shattered and, as shown on Fig. 2, a prominent shear zone was uncovered on the east side of the cut. This shear zone has a strike of North 10° East and dips 75° East. This shear zone appears to widen out toward the south where it enteres a very soft zone just below the little shaft. In that the bulldozer would mire down here, no further excavating was done to the south where this shear zone approaches the cross shearing indicated by the springs.

A careful study was made of the mineralization exposed in the cut and it appeared that exposed mineralization faded toward the north and become more intense toward the south. Both the shear zone and the wall rock showed this. In places the wall rock is completely replaced by iron sulfides and appears as a granular blue to green mass which oxidized in the upper four to five feet of bedrock to a red, brown and yellow mass of decomposed rock. Considerable panning all over the cut particularly toward the southern end showed much iron sulfides, some magnetite plus fine granular black mineral. In some of the panning traces of cinnabar was noted. With such an intense mineralization and the soft gooey character of the material panned, I suspected that much of the cinnabar was so fine as to be washed away and that the black and dark red minerals left in the concentrate was metacinnabarite and dark cinnabar. These concentrates were saved and examined later then given qualitative chemical tests. Every one showed mercury particularly the soft ore material just below the little shaft. In that I had no Diphenol Carboside to make a particularly sensitive microchemical test, I used instead solution with nitric acid and copper wire on which any disolved mercury plates.

Samples were taken as shown on Fig. 2 and are listed as follows:

Sample No. 1 from 1.8' x 0.2' x o.1' channel cut across the shear zone at approximately (referring to the USGS grid) 660E-600S. Much finely broken banded opalite intermined with gouge.

Sample No. 2 taken 5 feet South 10° West on strike of some shear zone from channel 1.3' x 0.2' x 0.1' across shear. Highly sheared vein material with finely broken banded opalite and pyrite.

Sample No. 3 taken 5 feet from No. 2 on strike from channel 1.2' x 0.2' x 0.1' across shear zone. Similar but more compact that ore material sampled by No. 2.

Sample No. 4 taken 5 feet from No. 3 on strike from channel 1.0' x 0.2' x 0.1' across shear zone. Material highly sheared but more compact than No. 3 with little or no opalite observed but fine pyrite impregnation.

Sample No. 5 taken at random around a 1.0' x 5.0' exposed face of blue rock heavily impregnated with finely divided sulfides on west wall of cut across from portal of adit.

Sample No. 6 taken at random from approximately 2 ft. of soft, red and yellow gouge in shear zone about 40 ft. on strike from No. 4. This material panned by bright reddish orange.

Sample No. 7 was taken at random from west wall of cut south from No. 5 for about 20 feet. Much of this was broken, decomposed wall rock with some sulfide impregnation.

The above samples were shipped to Abbot A. Hanks, Inc., San Francisco, Calif., for mercury analysis. On receipt of returns, I have suggested that the returned discards from Samples No. 5 and 6 be sent to Dr. John Herman of Smith-Emory Co., Los Angeles, for mass spectrographic analysis to determine approximate contect of various metals other than mercury.

In conclusion, I must first state that I was very impressed by the mineralized showing exposed in the cut for surely this area is a ore zone of considerable magnitude. Unlike the previous method of exploration, I would strongly suggest that exploration be confined to this mineralized zone and follow it to the southwest by bulldozer cuts at intervals not excced 50 feet apart. Then on the results of on-the-job testing and panning plus results of assays, I would recommend wash boring to sample depth of this ore zone.

The length of cross cutting with a bulldozer should not exceed 200 feet south and west of the present cut. This would amount to possible one week making five to six cuts east-west across the strike of the shear zone except for the intersection of the shear zone 150 to 200 feet to the south where cuts might possibly be made more northwesterly for better results. The total cost will not exceed $1,500 and in comparison with the cost of previous underground exploration will result in more ore showings than has been encountered heretofore.

The main objective is to stay with this mineralization following it out on strike in that more will be gained by this method than any theoretical cross-country probing such as has been done before. Following shear zones that will contain the ore will thoroughly prospect the region. Attempting to cut across country to intersect shear zones has been expensive without compensating results. I cannot impress upon you too strongly that only following shears and cross shears will pay the greatest dividends by opening up the ore shoots at interesections of these shear zones.

Respectfully submitted,

(Sgd) Burton J. Westman

Burton J. Westman, B.Sc.
MINING GEOLOGIST & ENGINEER

BJW/me

MINING CLAIMANT'S EXHIBIT W

REPORT ON THE

INDEPENDENT QUICKSILVER PROPERTY

Sec. 20, T14S - R20E W. M.

Crook County, Oregon

by
Burton J. Westman
Mining Geologist
Aloha, Oregon

November 25, 1952

REPORT ON THE INDEPENDENT QUICKSILVER PROPERTY

Since the writer's last report on the Independent Quicksilver Property, dated December 15, 1951, the writer has spent most of the past summer on othe properties nearby. During this time much field evidence was gathered to substantiate the existence of a regional geologic pattern along Johnson Creek that will have a definite bearing on exploring for commercial ore.

During the past year, at various meetings with members of the Indepen ent Quicksilver Co., it was repeatedly stressed that every exploratory move upon the Independent Quicksilver Property would have to be made primarily with development of the geologic structure picture. In an area so adversly covered with overburden this can be the only approach to commercial ore indirect as it may seem at times.

The first step in this direction was the bulldozing in October, 1951, to verify the existence and particularly the strike of the shear zone exposed in the big cut (called the "July Cut No. 1" in the later reports). Two cuts, October Cut No. 1 and October Cut No. 2 did this quite accurately. From the original pace and compass work (October 9, 1951) the strike was assumed to be N10°E, but later developments have shown the true strike to be N18°50'E based on a transit survey.

The next step was to explore this shear zone to the south and expose an intersecting cross fault (trending N45°W indicated by the U.S.G.S. geophysical work, local topography and by study of serial photography) also to

strip to the north to expose the shear zone between October Cuts Nos. 1 and 2. Bulldozing during June, 1952, did the latter and exposed a mineralized shear zone more than 50 feet in width above and to the east of a well defined foot-wall. Bulldozing to the south was almost a complete failure due to unexpected deep and extremely rocky overburden. One deep cross cut was made over the postulated cross fault and, on encountering soft ground beneath the rocky overburden, the bulldozer almost disappeared requiring another bulldozer and over two days to extract it.

The next phase of exploration employed contract churn drilling in October 1952. Five holes were planned. Two holes were completed, and the third was stopped due to a worn out bit. Illness of the driller and severe winter weather suspended this operation.

The first two holes, however, did confirm the existence of a major cross fault offsetting the shear zone and, as a result of washing the disturbed material off of the shear zone near Hole No. 3, the presence of a small vein crossing the main shear zone was discovered. This cross vein was then found to carry varying cinnabar values, whereas the enclosing shear zone apparently is relatively barren. Other such cross veins are indicated on the accompanying map. These veins are particularly significant in that they point to the presence of a hanging wall shear zone.

Some of the foregoing now appears to bear out findings of previous years. Gleening through accumulated papers brought out several interesting discoveries which apparently assayed up to 35 pound ore below the Greenback tunnel, but unfortunately no record or survey was kept of their exact locations.

The same applies to the drill holes shown on the accompanying map particularl Hole No. 4 which must have struck good ore between the 33- and 38-foot depths. Why these showings were not followed is problematical.

Aside from the exploration on the Greenback claim, which is of current interest, much development work prior to 1940 was done on the Bonanza and the New Era Claims 1100 to 1800 feet west. Here some 18,600 tons averaging 5.2 pounds has been proved. At current prices this is equivalent to 1270 flasks valued at around $254,000. which is an attractive ore reserve.

From a regional standpoint this ore has been developed on a prominent shear zone, bearing N60°E from the Mother Lode Mine. This shear zone apparently step faulted repeatedly by cross faults striking in a northwesterly direction. Intersecting this shear zone are cross veins striking N10°E to N20°E. In adjoining mines it was these intersecting cross veins which accounted for most of the ore mined. Here we see a geologic pattern repeated and at some point on the southern portion of the Pioneer claim the very favorable Greenback shear zone will intersect as undoubtedly others of the same strike will.

Regarding the accompanying map showing workings of the Independent Mine, the line from FW-3 to N-2 shows the true course of the footwall of the Greenback shear zone. This probably is the same footwall to which Frank G. Johnson referred in a letter dated August 8, 1938 calling this new vein the "Lavina". This prospect was the small cut near FW-C from which augering produced 400 to 500 colors per 3-lb. panning sample of grey and red mud (gouge) containing a large quantity of quartz. Recently the writer found loose

material near FW-C exposed by stripping which was mostly oddly cellular quartz and cinnabar. This material undoubtedly derived from the indicated cross vein.

Likewise the ore encountered in Drill Hole No. 4, Sept., 1938, very possibly could have been encountered in the vein exposed in the roadway 70 feet southeast of FW-A. The record of this 1938 drilling refers to distances from the Greenback tunnel; true bearings, however, were plotted while magnetic bearings would shift the locations of the drill holes on the map farther north or over and above cross veins. This vein, incidentally, may continue northwest beyond the footwall in that the hard red andesite at FW-B and northeast does not appear in the footwall on the north end of the July No. 1 cut. This is repeated in reverse somewhere between the south end of this cut and the Ontka cut where hard red andesite forms the footwall. That this contact may extend to the northwest is confirmed by the cut made in October, 1952, the bedrock of which is a soft dark granular mineralized rock. This cut was not extended far enough to expose the contact which may well be ore bearing considering the extremely high anomalies over the area indicated by the circled "H" and the good cinnabar showings encountered in the Ontka cut.

These cross veins appear parallel to the indicated major cross fault between FW-3 and FW-4. This fault was confirmed by the recent drilling. Drill Hole No. 1 encountered soft highly mineralized shear zone, bearing some cinnabar for its full depth of 75 feet. Hole No. 2 down to 42 feet total depth

encountered very hard rock with much quartz, although some cinnabar and occasional free mercury were observed by washing some of the cuttings.

This major cross fault is further established by a cut at E-5 where shattered andesite with quartz was encountered. Just south of E-2 another cut was attempted to cut the cross fault, but deep surface prevented this. As reported previously, this cross fault can be observed further to the southeast on the high plateau on Lookout Mt. To date, however, nothing has been observed to determine the extent or direction this cross fault offsets the Greenback shear zone.

Now, regarding the cross veins previously discussed, it seems reasonable to assume that some 100 feet east of the Greenback shear zone footwall, there exists a hanging wall shear zone which the cross veins intersect. The presence of such a hangingwall shear zone was first recognized by Miles Belden, Mining Engineer, who had the Belden Adit started, but which was never extended beyond 25 feet where a soft granular grey andesite was encountered. Pannings above this adit along the hill side of ocherous surface material, however, indicate the proximity of cinnabar bearing zone nearby to the east (uphill beneath the Morris dump). This was shown on the accompanying map as a "Probable Hangingwall Shear Zone".

The Greenback Shear Zone, from observations and ore production elsewhere, is on the N20°E strike. Extending this zone about 900 feet to the northeast, an intersection with the Johnson Creek vein will be had in the vicinity of the southeast corner common to the Pioneer and Ruby claims.

The most production steps to further develop the property should be based on the foregoing outline of the geologic structure.

Due to the very poor results, further churn drilling cannot be considered in that not only must the main Greenback shear zone be cut at right angles, but so placed as to cut the cross veins that have been determined to be the cinnabar bearings. In addition to this, cores must be obtained wherever possible and drive sampling with a churn drill does not meet these requirements.

It is advisable, then, to obtain a small diamond drill which can be spotted anywhere and capable of drilling at any angle to a depth of 250 ft. Such a unit can be used for rapid wash boring if need be. Much of the softer rock in the shear zone can be cut and cored with a carbide bit such as is manufactured by Kennametal Corp.

This diamond drilling can be used to prospect the shear zone at FW-4, in the area of the Belden adit and further northeast.

Additional exploration should be done along those cross veins from the footwall of the Greenback shear zone southeast to the hangingwall.

In that the overburden is very shallow to the northeast, an augering program should be carried on along the strike of the Greenback shear zone in order to follow out this zone to the Pioneer claims. Later, depending upon results, several bulldozer cuts should be made to expose the veins.

This bulldozing can be done following a cleanup project to open those cuts on the New Era and Bonanza claims so that resampling can be accomplished. In addition to this, Cuts A and C should be deepened so as to reach bed-

rock and cut the Johnson Creek vein which must lie immediately to the southeast of Cut D as shown by the quartz and cinnabar which are present in considerable amounts in the overburden above the bedrock east of Cut D. That the Johnson Creek vein was exposed by Cut D, as shown on old maps, cannot be agreed upon in that only relatively undisturbed andesite was observed in the bottom of this cut while much ochre, quartz and other indications of the proximity of a large vein are present in the east bank slopes.

This vein has a strike of N60° E and represents the cut-off structure found in the Mother Lode workings. This ore bearing veins are those that have a strike of N10° E to N20° E which intersects the above cutoff structure of the Johnson Creek vein. Therefore, on exposing the Johnson Creek vein it is imperative to expose the southeast or hangingwall along the strike in order to expose the productive northerly veins, one of which is quite logically responsible for the ore that was developed in Cut G.

In conclusion it must be stated that the foregoing program can and will produce considerable ore providing that the records are kept accurate and up-to-date. This shall include accurate surveying, sampling, and structural mapping to guide exploration as it progresses.

Respectfully submitted,

(Sgd) Burton J. Westman

BURTON J. WESTMAN
Mining Geologist

Aloha, Oregon

BJW: pw

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FORD M. CONVERSE, Plaintiff, v. STEWART L. UDALL, Secretary of the Interior, Defendant.	)	CIVIL NO. 65-581
INDEPENDENT QUICK SILVER CO., an Oregon corporation, Plaintiff, v. STEWART L. UDALL, Secretary of the Interior, Defendant.	)	CIVIL NO. 65-590 OPINION

KILKENNY, DISTRICT JUDGE:

FACTS IN GENERAL

These cases are considered together, as they present many common questions of law and fact. The chain of events culminating in this review began with two hearings in Portland, United States v. Converse (Contest No. 011195-D) and United States v. Independent Quick Silver Co. (Contest No. 06189-A). The hearings were initiated by the Forest Service, United States Department of Agriculture, pursuant to Section 5 of the Act of July 23, 1955, 69 Stat. 369, as amended, 30 U.S.C. § 613 (Supp. 1965).

The statute, popularly known as the Surface Resources Act, provided in general that rights under any mining claim located after July 23, 1955, the date of the Act's passage, would be subject to the right of the United States to manage and dispose of surface resources other than mineral deposits. It also provided that no mining claim located after that date could be used, prior to the issuance of a patent, for purposes other than prospecting, mining and processing. The purpose of this statute was not to abolish mining claims or to significantly alter mining law, but to limit the use, or misuse, of surface resources (such as timber or peat) by a mining claimant prior to the issuance of a patent, and it applies only to mining claims located after July 23, 1955.

Consequently, if a mining claim was in all respects valid prior to July 23, 1955, it was not subject to the right of the United States to manage and dispose its surface resources. But because a mining claim is not considered valid until (a) the boundaries of the claim are marked and until (b) a discovery of a valuable mineral deposit has been made, it became necessary in many instances to make investigations and hold hearings to determine whether or not both of these prerequisites were met prior to the date of the Act's passage. The Act contained detailed provisions for these proceedings.[1/] It was pursuant to these provisions that the two hearings here in question took place.

The first hearing, United States v. Converse, transpired June 11, 1962, and involved two mining claims.[2/] The second hearing, United States v.

1/ See 30 U.S.C. § 613 (a) to (e) (Supp. 1965)

2/ Paymaster and Edith Lode, embraced within Secs. 1 and 2, T. 12 S., R. 4 E., W.M., Oregon, (Willamette National Forest), Recorded in Book 8, Pages 214 and 215, Official Records of Linn County, Oregon.

Independent Quick Silver Co., took place October 1, 1962, and involved twenty-two mining claims. 3/ Both of these hearings were presided over by Graydon E. Holt, hearing examiner for the Bureau of Land Management, who was then stationed at Sacramento, California.

UNITED STATES v. CONVERSE

At the Converse hearing, the mining claimant Converse filed a motion to change the hearing examiner and filed an affidavit in support of that motion, charging the hearing examiner with bias and prejudice. The motion was denied because not timely filed, and the hearing continued. From the evidence adduced at the hearing, Hearing Examiner Holt concluded that the most favorable finding which could be made for the mining claimant was that there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed, but that there was not sufficient evidence of mineralization, as of July 23, 1955, to induce a prudent man to expend labor and means on either the Paymaster or Edith Lode claims with a reasonable expectation of developing a valuable mine. As a result, these two mining claims were held not to have been validated prior to passage of the Surface Resources Act, and were found to be subject to the limitations and restrictions of that Act.

This determination did not directly affect the mining claims themselves. The mining claimant still had the right to use the claims for mining purposes,

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3/ Happy Chance, Prospect, Crystal, Pioneer, Ruby, Bonanza, Grub Stake, Zero, Good Luck, New Era, Lost Claim, Green Back, Columbia, Eastern Star, Cosmopolitan, Princess, Commodore, Aetna, Ajax, Aztec, Cornucopia and Jewell Mining Claims, embraced within Sections 17, 19, 20, and 21, T. 14 S., R. 20 E., W.M., Crook County, Oregon

and for any other purpose incidental to mining. The adverse determination to mining claimant Converse only precluded him from using the surface resources (including the timber of the claims, which the parties stipulated to have a value of $91,038.61) in a manner not incidental to mining, and made the claims subject to the right of the government to manage the surface resources, until a patent was obtained.

Following administrative regulations, claimant Converse appealed the decision of Hearing Examiner Holt to the Director of the Bureau of Land Management. He contended in substance that: a fair hearing was impossible because the examiner was prejudiced and had prejudged the case; he was entitled to a jury trial, and the administrative hearing was a deprivation of property without due process of law; the government had failed to establish a prima facie case, and he had affirmatively showed that a discovery had been made on each of the claims; the hearing examiner erred in holding that assays of ore samples taken by the mining claimant after July 23, 1955, were inadmissible, while those taken by the contestant after the same date were admissible; and, thegovernment's witnesses did not fairly sample portions of the claims alleged to have been opened prior to 1955.

On October 8, 1963, the Assistant Director, Bureau of Land Management, affirmed the decision of Hearing Examiner Holt. Claimant Converse then appealed to the Secretary of the Interior, reiterating essentially the same arguments that were contained in his appeal to the Director of the Bureau of Land Management, and adding the contentions that the Director erred in holding that

exploration and development," as used in mining laws are not synonomous, and that the Director either ignored or refused to accept the facts found by the hearing examiner. On March 26, 1965, the decision of the Assistant Director was affirmed by Ernest F. Hom, Assistant Solicitor of the Interior, pursuant to authority delegated by the Secretary of the Interior.

UNITED STATES v. INDEPENDENT QUICK SILVER CO.

Five days prior to the Independent Quick Silver Co. hearing, the mining claimant mailed a motion for change of hearing examiner, together with a supporting affidavit, charging bias, to Hearing Examiner Holt at his Sacramento office. The claimant argued that this was the first date that it knew Holt was going to hear the matter, but the claimant had been in correspondence with Holt, regarding the case, for some seven months prior to the hearing. This motion was denied by Hearing Examiner Holt at the outset of the hearing, on the grounds that the motion had not been timely filed as required by 5 U.S.C. § 1006 (a). The hearing then continued, and revolved around the charges that there had been no valuable mineral discovery on any of the twenty-two claims prior to July 23, 1955, and that the boundaries of the claims had not been distinctly marked on the ground. Hearing Examiner Holt held that, with respect to the Bonanza claim, a valuable mineral deposit had been found and that the claimant was entitled to surface rights on that claim. Regarding the other twenty-one claims, he found that the government had established a prima facie case in support of the two charges, which had not been refuted by the claimant. As a result, these twenty-one mining claims were held subject to the restrictions of the Surface

Resources Act. Regarding the charge that the boundaries of the claims had not been distinctly marked on the ground, the hearing examiner found that the evidence indicated that there were only two known corner posts for the twenty-two claims involved.

Both the government and Independent Quick Silver Co. appealed from this determination by the hearing examiner. Independent Quick Silver argued that: the hearing examiner erred in failing to grant its motion for change of hearing examiner; the hearing was a denial of due process and equal protection, and a taking of property without just compensation the government failed to establish a prima facie case in support of the charges listed in the notice of hearing; the hearing examiner should have allowed its motion to exclude all of the assay reports of the government which were taken after 1955; it was proven by a preponderance of the evidence that discoveries existed on each of the claims involved; and, the examiner erred in failing to adopt certain of its requestedfindings of fact The United States, in its appeal, argued that the hearing examiner had correctly found twenty-one of the claims subject to the limitations of the Surface Resource Act, but that the hearing examiner erred in failing to restrict the mining claimant's surface rights on a portion of the Bonanza claim after finding that the boundaries of that claim were not distinctly marked on the ground, and in finding that a discovery of a valuable mineral deposit had been made on a portion of the Bonanza claim.

On June 23, 1964, James F. Doyle, Chief of the Office of Appeals and Hearings of the Bureau of Land Management, affirmed the decision of Hearing

xaminer Holt insofar as he held that the twenty-one claims were subject to the estrictions of the Surface Resources Act. The hearing examiner's determination hat the Bonanza claim was not subject to the restrictions of the Act was reversed, owever, and the government's assertions on appeal were adopted. Independent)uick Silver Co. then appealed this decision to the Secretary of the Interior, as rovided for in the administrative regulations. On September 21, 1965, the ecision of Doyle was affirmed in all respects by Ernest F. Hom, Assistant olicitor of the Department of the Interior, pursuant to authority delegated by the ecretary of the Interior.

CONTENTIONS

Converse and Independent Quick Silver Co., as plaintiffs, are before his Court, in separate actions, in an attempt to vacate the decisions of the ecretary of the Interior, through his duly authorized Assistant Solicitor, whereby ll the mining claims in question were held subject to the restrictions of the urface Resources Act. Both parties have moved for summary judgment based on he record in the administrative file. Review of Secretary Udall's decision may e had under the Administrative Procedure Act, 5 U.S.C. § 1009. Jurisdiction f this Court is based upon that section and upon 28 U.S.C. § 1331. Venue is aid under 28 U.S.C. § 1391 (e). In both cases, plaintiffs make the following ain contentions:

(1) that plaintiffs were denied due process, for they were compelled o try their cause before a hearing examiner who was biased as a matter of law nd as a matter of fact;

(2) that due process was violated because the Secretary of the Interio lacked authority and jurisdiction, by his failure to follow Section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (a);

(3) that due process was violated because the Secretary's decision was based on charges different from those laid, for the hearing examiner switche the charges laid to a difference charge during the hearing.

Plaintiffs then make several contentions which attack the merits of the two decisions. They are:

(4) that the government had failed in its burden of proof, as it did not establish a prima facie case by substantial evidence;

(5) that error had been committed in finding the claims subject to the restrictions of the Surface Resources Act, as the record shows that a valuable deposit of ore was discovered on the claims prior to July 23, 1955.

The United States, as defendant in both these actions, contends that the decisions of the Department of the Interior holding that the government has the surface management rights until such time that patents are issued for the mining claims must be affirmed, as they are fully supported by substantial evidence in the administrative records.

DISCUSSION

Alleged Bias of Hearing Examiner Holt

Independent Quick Silver Co.

In Independent Quick Silver Co., plaintiff insists that Hearing Examiner Holt was biased both as a matter of fact and as a matter of law. As its basis

or arguing bias as a matter of law, plaintiff argues that the hearing examiner igned the Notice of Hearing, that the Notice of Hearing should be treated as a omplaint in this case, and that, therefore, the hearing examiner both laid the harges and sat in judgment on his own charges. Plaintiff contends then, that his combination of the prosecuting and judging functions violates both the dministrative Procedure Act and the due process clause of the United States Constitution.

As its basis for arguing bias as a matter of fact, plaintiff calls attention o his motion for change of hearing examiner and supporting affidavit. At the utset of the hearing in question here, the mining claimant attempted to call the earing examiner as a witness, in support of the charge that he was prejudiced nd had pre-judged the case. When the hearing examiner declined to testify, the ining claimant made an offer of proof "to prove that had Graydon Holt, the Hearing Examiner, testified, that he would have admitted that he had pre-udged the case, and, therefore, was prejudiced." The hearing examiner then tated he would not comment on the offer of proof, and plaintiff argues that by assing over the matter without comment the hearing examiner admitted that the harge was correct.

The affidavit signed by the President of Quick Silver is set forth in the [4/] ootnote.

/ "I have ascertained and therefore aver that Graydon E. Holt, Hearing Examiner, as never decided a mining case in favor of mining claimants with respect to the uestion of sufficiency of mineral discovery in any case involving Oregon lands. hat the members of my Company are not agreed and feel that they can not have fair and impartial trial of their case before Graydon Holt, Hearing Examiner."

Plaintiff's motion for a change of hearing examiner was denied by Hearing Examiner Holt, on the ground that the motion was not timely filed as required by 5 U. S. C. § 1006 (a).

Converse

In Converse, plaintiff also argues that Hearing Examiner Holt was biased both as a fact and as a matter of law. As its basis for arguing bias as a matter of law, plaintiff utilizes the same argument made in Quick Silver, i.e. that, by signing the Notice of Hearing, Hearing Examiner Holt in effect signed the complaint, and thus took part in the prosecution of the case he later heard.

The basis for arguing bias as a matter of fact is slightly different in this case. An affidavit was filed at the outset of the hearing, in which Converse stated that Hearing Examiner Holt had heard a previous case in which Converse was a mining claimant, and that the case was decided adverse to himself. The balance of the affidavit is set forth in the footnote. 5/

5/ "That based upon the decision in that case and upon the conduct of the Examiner in that case, and upon my own independent investigation, I have concluded that said Hearing Examiner cannot try the above entitled case in an impartial manner, that he has prejudged my case and is unable to grasp any evidence which does not harmonize with his preconceived opinion of the matter. That for me to have a hearing before said examiner is a vain and useless gesture. That I am informed and believe that no mining claimant has ever prevailed in the State of Oregon in a contest of this kind heard by Graydon E. Holt. That I am convince that if said examiner is permitted to hear my case, that he will ignore the facts, refuse to make findings in accordance with the evidence, and will decide the case against me to please his superiors; that he will exercise no independent judgment of his own but will subordinate the merits to politically dictated policy.

Attorney for plaintiff Converse made a motion for change of hearing xaminer under the Administrative Procedure Act, 5 U.S.C. § 1006 (a), and sked to call Hearing Examiner Holt to testify in order to prove the averments n Converse's affidavit. The motion for change of hearing examiner was denied, n the ground that it had not been timely filed, and Hearing Examiner Holt efused to testify. The following colloquy then took place between the hearing xaminer and Murray, attorney for plaintiff Converse:

> "MR. MURRAY: Do I understand that the Hearing Examiner refuses to testify as a witness in support of the facts averred in the affidavit here?
>
> HEARING EXAMINER HOLT: That's correct.
>
> MR. MURRAY: And does the Hearing Examiner deny the offer of proof that we propose to prove by the testimony of the Hearing Examiner as to the facts averred in the affidavit?
>
> HEARING EXAMINER HOLT: I don't deny the facts. I just deny the motion. You may make an offer of proof, if you care to."

laintiff Converse argues that the hearing examiner's statement, "I don't deny the facts," is an admission of the truthfulness of all the allegations set out bove in the affidavit, and that it, therefore, establishes bias in fact.

The Applicable Law

In NLRB v. Acme-Evans Co., 130 F. 2d 477, 482 (7th Cir. 1942), the ourt stated: "The heat of the contest has, we think, led respondent to attribute ias because of the intensity of its own feelings." Those words seem appropriate ere, for when the assertions of bias in these cases are closely scrutinized, : seems quite clear that intense feelings are all plaintiffs have been able to

muster. The briefs, especially on this point, are pregnant with inference, inuendo, and inapplicable (or non-existent) law, but woefully lacking in anything else. It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. United States ex rel De Luca v. O'Rourke, 213 F.2d 759, 763 (8th Cir. 1954). Plaintiffs, in my opinion, have fallen far short of meeting this test and, conversely, the record indicates that their hearings were conducted fairly and impartially by Hearing Examiner Holt.

A hearing examiner is not biased, either in law or in fact, simply because he previously ruled against one of the parties. NLRB v. Donnelly Garment Co., et al, 330 U.S. 219 (1947). In the light of this opinion, Converse's allegation that Hearing Examiner Holt had ruled against him in a previous case, is, in itself, of no importance.

The allegations in the affidavits that the examiner had never decided a case of this type in favor of mining claimants, are belied by the record which contains copies of findings prepared by the examiner in which he decided wholly or partially in favor of mining claimants in cases involving Oregon land. But, even if we were to assume that Holt was predisposed in favor of the government in such actions, the fact remains that the bias has to be personal in order for them to prevail. 6/

6/ "It has been held that the bias or prejudice alleged must be 'personal', and that a mere prejudgment of the case is not sufficient." Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589, 592 (7th Cir. 1945).

Anyway, plaintiffs have not even attempted to show personal bias on the part of Hearing Examiner Holt. He was most solicitous of their feelings at the hearing, and overruled most of defendant's objections, while at the same time sustaining plaintiffs on many of the "grey" points. In Converse, as an example, Holt excused one of plaintiff's witnesses after a lengthy direct examination, and stipulated that cross-examination could be taken at a later date, because the witness did not want to continue on the stand and had had heart trouble in the past. Hearsay evidence was often admitted into the evidence for plaintiffs by Holt, over objections by government counsel. In short, he, throughout both hearings, went out of his way to accomodate plaintiffs.

The rule that applies to federal judges does not here apply. One of the leading authorities in administrative law, states:

> "Unlike federal district judges, examiners and other officers participating in decisions are not forced to withdraw upon the mere filing of a sufficient affidavit." Davis, Administrative Law Text, p. 223.

Plaintiffs' argument that Holt, by signing the notice of hearing, was combining the functions of a prosecutor and a judge, thus violating both the Administrative Procedure Act and due process, is completely specious. These notices of hearing did nothing more than notify the plaintiffs of the issues to be dealt with at the subsequent proceedings. The fact that Holt signed such documents, and later presided at the hearing, is no more a violation of due process than the pre-trial orders federal judges sign every day. Moreover, plaintiffs' contention is based on the premise that the hearing examiner brought the charge against these claims, but the simple fact is that he did not. The

Forest Service initiated the charges, and this is made clear by the notice of hearing. Thus, Holt merely informed the plaintiff of the charges which were brought by the agency. Even if he had instituted the proceedings, this would not have violated the Administrative Procedure Act:

> "The APA says nothing about combination of instituting proceedings with judging. Under the Act, the same individual may 'accuse," in the sense of deciding that proceedings should be instituted, and may also judge." Davis, Administrative Law Text, p. 242.

Support is found in a law review survey of the law in this area. Note, "Disqualification of Administrative Officials for Bias," 13 Vand. L. Rev. 712, 722, n. 65 (1960).

In Independent Quick Silver, plaintiff argues that by passing over the offer to prove that he was biased without commenting on it, Holt admitted that the charge was correct. Plaintiff has not cited any law which indicates silence can be construed as assent in such a situation. On the other hand, United States v. Morgan, 313 U.S. 409 (1941), supports the opposite view.

In Converse, plaintiff argues that when Holt, in denying the offer of proof that he was biased, stated: "I don't deny the facts. I just deny the motion.", he admitted the truthfulness of the allegations contained in the affidavit. One must be a gymnast in semantics in order to arrive at this conclusion. The statement, when read in context, lends nothing to plaintiff's position.

Both motions for change of hearing examiner were denied on the grounds that they were not timely and sufficient as required by 5 U.S.C. § 1006 (a).

There seems to be a substantial basis in the administrative record for this determination.

Regarding the timeliness of the motion in Converse, even though Hearing Examiner Holt signed the notice of hearing, and even though the plaintiff had been in correspondence with Holt, in his official capacity, for some time prior to the hearing, plaintiff insists that the motion for change of hearing examiner could not have been made prior to the start of the hearing, because he did not even suspect Holt was to hear the case. The record anchors a finding that plaintiff knew for some time that Holt was to hear the case. Furthermore, to permit a mining claimant to delay hearings by waiting until the commencement of a hearing to ask for a change of hearing examiner, where as here it was necessary for the hearing examiner to travel several hundred miles to be present at a hearing, would frustrate the administrative process.

In Independent Quick Silver, the motion for change of hearing examiner and supporting affidavit were not "sufficient," inasmuch as they show no real basis for concluding bias. Moreover, the motion does not seem to have been "timely" presented, at least under the circumstances of this case. The motion was not mailed to Holt, at his Sacramento office, until September 26, 1962, five days before the hearing started. Plaintiff states that this was the first date that it "chanced upon the information that Mr. Holt intended to preside." But plaintiff had written to Holt, in his official capacity, some <u>five months</u> prior to the hearing, asking for a postponement. It is the practice of the hearing examiners' office at the Bureau of Land Management to have the hearing

examiner who signs the notice of hearing preside at the hearing and write the decision. The attorney for Independent Quick Silver was experienced with this type of case and should have been aware of that practice. For that matter, it was he who represented plaintiff Converse at the other hearing in question here, which took place over three months prior to the filing of this motion.

Secretary's Authority and Jurisdiction

Both plaintiffs argue that Secretary Udall has denied them due process and "protection of the law" by failing to follow each jurisdictional requirement of the Surface Resources Act, 30 U.S.C. § 613 (a), the statute which gave him authority to determine title problems with reference to mining claims. In both briefs, plaintiffs set out many instances in which they assert the Secretary did not comply with the statutory requirements. They are listed and discussed below.

1. No head of a Federal Department requested the Department of the Interior to publish notice to mining claimant. The Chief of the Forest Service, in fact, requested the Department of the Interior to publish the notice to the mining claimants.

2. No such request was made which contained a description of the land by sections. This is without foundation, as the requests, in fact, contained such descriptions.

3. The request for publication was not accompanied by the required affidavit of an affiant who had, in fact, examined the lands. The requests, in fact, were accompanied by affidavits of affiants who had examined the lands.

4. No request for publication was accompanied by the required certifi-te of title or abstract of title. Here the plaintiffs are technically correct, as e defendant could not comply with the literal wording of the statute due to the ct that there were no tract indexes of the lands in question maintained in the cords of Linn and Crook Counties. Because of this fact, defendant instead bmitted certificates of the nonexistence of the tract indexes. Obviously, mpliance was impossible and the point does not go to the merits.

5 and 6. Plaintiffs allege that the Secretary did not publish notice as quired, and that there is no proof of the publication. The affidavits of pub-cation submitted by defendant show that the notices were published.

7. A copy of the publication was not served on the mining claimant as manded by the statute. This was not done because the affidavits of examina-on did not show that plaintiffs were in possession of the claims, and, as inted out above, no tract indexes were kept of these lands by the counties in nich they were situated. However, a man who was found on the claims when e mining engineers examined them was served with a copy of the notice of blication, and the notices were published by the local newspapers in accord-ce with the regulations. Anyhow, plaintiffs were completely informed of the tice of publication, as they answered it by filing their verified statements. ey are in no position to question the service.

Both plaintiffs also argue that the procedure followed by the Bureau of nd Management in initiating contests must be followed in proceedings under e Surface Resources Act. There is no such requirement. The use of a com-aint is averted by the publication requirements of that statute.

THE ALLEGED AMENDMENTS

Both plaintiffs assert that due process was violated because the Secretary's decision was based on charges different than those laid, and that the hearing examiner switched the charges during the hearing. This allegation is also without foundation. The Notices of Hearing stated that the questions to be determined would be whether sufficient minerals had been found within the limits of the claims to constitute a discovery of a valuable mineral deposit, and whether the claims were sufficiently marked. This ground was not changed by the hearing examiner or by either of the two administrative appeals decisions which followed in both cases.

Again, plaintiffs indulge in a play on words. They argue that the notice of hearing said only that the question as to whether mineral discovery had been made within the limits of the claims would be determined. Then they argue that this meant only that their case would be won if they could show a valuable mineral deposit within the boundaries of any of the claims, but that the hearing examiner changed the charges by requiring that a valuable mineral deposit be proven in each and every claim. Suffice to say, the Surface Resources Act requires that a mining claim be located on each and every claim, in order for them to escape the scope of the Act. The argument is frivolous.

Plaintiffs make much of the fact that the hearing examiner admitted samples taken by the government after the effective date of the Surface Resources Act, while at the same time denying plaintiffs' motion to admit some samples taken after that date. The issue is not whether there was a discovery at the

ate of the hearing, but whether a discovery was made upon the claims in ques-
ion prior to the passage of the Surface Resources Act. To demonstrate a dis-
overy prior to July 23, 1955, required samples of mineral from portions of the
laims exposed prior to that date. Plaintiffs' evidence of mineral deposits
xposed at a later date was not material. The government's samples were
aken from areas which were exposed on or before the date of the Act.

EFFECT OF THE DECISIONS

The Ninth Circuit Court of Appeals has held that:

> "It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed." Hendrickson v. Udall, 350 F.2d 949, 950 (9th Cir. 1965); Adams v. United States, 318 F.2d 861 (9th Cir. 1963).

Upon a review of the entire records of the two proceedings in question
ere, it is my finding that there is substantial evidence to support the Secre-
ary's decision. A discussion of some of plaintiffs' arguments which attack the
erits of these decisions follows.

BURDEN OF PROOF

When the government contests a mining claim, it bears the burden of
oing forward with sufficient evidence to establish a prima facie case. The
urden then shifts to the claimant to show, by a preponderance of the evidence,
hat his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).
8 I.D. 235, 238 (1961).

From an examination of the entire record, I find that the government did sustain its burden of proof. Manifestly, the testimony of the government witnesses was sufficient to create a prima facie case in favor of the government's position. Their examination of the claims and their analysis of the mineral samples taken therefrom failed to disclose a discovery of a valuable mineral deposit on any one or more of the claims.

It is now settled beyond question that the issue of whether there has been a valid discovery of minerals is a question of fact. Furthermore, it is indicated that the decision of the Secretary on that issue is conclusive, in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450 (1920). Whether the decisions of the Secretary of the Interior in this case are conclusive, I need not decide. Certainly, there is no evidence of fraudulent, capricious or arbitrary action on the part of the Interior Department, unless it could be said that the action of the hearing examiner in failing to step aside could be viewed in that light. Already, I have decided adversely to the plaintiffs on this issue. Again, I repeat that the finding that a discovery of a valuable mineral deposit was not made on any one or more of the claimsprior to July 23, 1955, is supported by substantial evidence and must not be disturbed.

To be kept in mind is the fact that most of the higher quality samples of minerals, on which plaintiffs rely, were taken from cuts exposed after the effective date of the Act.

BONANZA CLAIM

One more problem which is worthy of discussion is the finding of the

hearing examiner in Independent Quick Silver that the Bonanza Claim was valid. The record quite conclusively shows that the boundary markings on the ground did not measure up to required standards. This fact was recognized by the examiner, but apparently overlooked when preparing his finding on the validity of the claim. Moreover, he assumed that certain improvements were within the boundaries of the claim, despite the fact that no substantial evidence was placed in the record in any way showing that fact.

As pointed out by the record on administrative appeal, the testimony of a Mr. Hogg, on which the hearing examiner relied, was grounded on hearsay. The witness based his testimony, not on his own knowledge, but on information supplied to him by a Mr. Champion, now deceased. The alleged summarization of Champion's panning estimates were not understood by the witness, nor could he make an explanation thereof. Even if I assume that Champion's panning estimates were business records, and thus admissible in evidence, those estimates, on their face, are not sufficient to establish the claim. In any event, there is no substantial evidence that the samples were produced from the earth within the boundaries of the Bonanza Claim, even if legal boundaries in fact existed. I find myself in full agreement with the summarization by the Secretary in his decision. 7/

7/ "...Although some ore was encountered, the writers of the reports apparently did not consider their findings adequate to support extended mining operations but in each report recommended further exploration. As discussed before, one ore body was defined by Hogg, but there was no evidence other than mention of that by Westman, apparently based on his reading of Hogg's report, otherwise verifying that it constituted a mineral deposit which might have value. The evidence does not show that there was any development work done on the ore body. This seems rather strange 23 years after its supposed
(Continued on page 22)

Although other contentions are made by the respective plaintiffs, I feel they are so intertwined with the subjects here discussed that further analysis is not required. It is sufficient to say that I find no substance in such contentions. Overall, the determination of the Secretary in each case must be affirmed.

Of course, this affirmance in no way affects the validity of the mining claims as such. Plaintiffs retain the right to work their claims for mining purposes, and for all purposes incidental to mining. This affirmance only precludes the plaintiffs from using the surface resources of the claims in a manner which is not incidental to mining, until a patent is obtained. In other words, the claims remain subject to the right of the government to manage the surface resources, when not interferring with the mining.

7/ (Continued from page 21)
delineation. The Forest Service mining examiners could not find an ore body exposed which had any cinnabar ore of value.

To conclude, the evidence submitted by the claimant was more quantitative than qualitative. There was a lack of specificity which would relate the information to a particular claim or claims. Much of the evidence was general in nature and much of it, especially specific information, was hearsay where there was no opportunity for cross examination and proper delineation of the purported facts s hown. In some instances there was no foundation for some of the information. At the most, even as to the purported ore body on the Bonanza claim, it is apparent that further developmental and exploratory work was recommended. Appellant did not present evidence which would show that any ore bodies supposedly found prior to 1955 constituted valuable mineral deposits as of July 23, 1955, by establishing that a prudent man could expect that the value of the ore would exceed costs in developing the mine and hence could expect that a profitable mine might be developed. This is the test for establishing a discovery in this case..."

The decision of the Secretary in each case must be affirmed.

DATED this 14th day of September, 1966.

John F. Kilkenny
District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FORD M. CONVERSE, Plaintiff,	)	
v.	)	CIVIL NO. 65-581
STEWART L. UDALL, Secretary of the Interior, Defandant.	)	
INDEPENDENT QUICK SILVER CO., an Oregon corporation, Plaintiff,	)	
v.	)	CIVIL NO. 65-590
STEWART L. UDALL, Secretary of the Interior, Defendant.	)	ORDER

This cause is before the Court on plaintiffs' motion for a new trial on the Court's previous decision of September 14, 1966.

Independent Quick Silver again challenges the Government's method of sampling each of the twenty-two claims involved, it being claimed that there was a failure to prove a prima facie case by substantial evidence. It is urged that the six samples of ore taken by the contestant all came from one

of the twenty-two claims in controversy, viz: the Lost Mine Claim.

The evidence is contrary to the plaintiff's contentions. The Forest Service Examiners spent three days examining the claim and, in fact, examined all of the places shown to them by the plaintiff's representatives and took samples of all of the cuts that were open. Plaintiff is not in a position to now urge that all of the samples came from one claim when it was its own representatives who directed the Forest Service Examiners to where to obtain the samples. If, as here, a close scrutiny of the surface indicated that no cuts had been opened other than examined, then it seems rather clear that a mineral discovery had not been made.

Plaintiff again urges that the Assistant Solicitor of the Interior committed error in holding that certain testimony and reports were hearsay. The Solicitor stated, in passing, that much of the evidence was general in nature and that much of it probably, especially specific information, was hearsay where there was no opportunity for cross-examination. Although the Solicitor might have disregarded some of the Hogg statements and the assays compiled by the geologist Westman, the fact remains that the Assistant Solicitor accepted all of this testimony and these records, but found that the evidence lacked specificity and showed only that further exploration was recommended. Plaintiff's real complaint is that the Solicitor did not give more weight to this evidence, rather than excluding it under the hearsay rule.

It is next urged that if the decision of September 14th is allowed to stand that the Court would be approving an administrative decision that the

discovery of a body of ore containing 18,600 tons, with an average of 5.2 pounds of mercury per ton, would not be a discovery within the meaning of the mining law. There is nothing in the decision of the Assistant Solicitor, nor, for that matter, in any part of the record, which supports this argument. The Solicitor merely held that the plaintiff did not sufficiently prove that such a body of ore existed. In other words, the Solicitor resolved the issue of fact against the plaintiff.

I find nothing in the arguments of Quicksilver which would cause me to, in any way, modify my original opinion.

In the Converse case, it is argued that the original decision departs from the well settled rule of discovery and makes discovery depend on the name applied to the additional work which a reasonably prudent person would be justified in expending in both money and effort. It is argued that the Assistant Solicitor has altered the long-standing policy of the Department and now recognizes a distinction between the terms "discovery", "development" and "exploration". The record leaves little doubt that the Department has long recognized a sharp distinction between "exploration" and "development" in connection with whether a "discovery" has been made. For example, if one has found only enough mineral to justify further "exploration", as yet he has not made a "discovery", but if he has found enough mineral to justify a "development", then a "discovery" has been made. The opinion of the Assistant Solicitor is given complete support by United States v. Altman, et al, 68 I.D. 235, 237-8 (1961), from which I quote:

> "There is, of course, a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are found of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made."

Additional support is added to the opinion of the Assistant Solicitor by United States v. Edgecumb Exploration Co., Inc., A-29908 (May 25, 1964).

Plaintiff fails to recognize that once the Government has established a prima facie case, the burden shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The motion for a new trial in each case is denied.

IT IS SO ORDERED.

DATED this 30th day of November, 1966.

John F. Kilkenny
District Judge

UNITED STATES v. RANDOLPH BELISLE

Colorado 034358-C (February 25, 1966)
Salt Lake City Office of Hearing Examine
Bureau of Land Management

SYLLABUS: MULTIPLE SURFACE USE ACT - Proof of Discovery; DISCOVERY - Nature of Requirement - Preudent Man Test - Proof - Time of Discovery

Where, in a proceeding under Section 5 of the Multiple Surface Use Act, the mining claimant prosents evidence sufficient to show that the "prudent man" test has been met, indeed exceeded, adverse proceedings instituted under the Act by the Forest Service will be dismissed. The evidence of the mining claimant included U.S. Geological Survey maps, made in 1942, of old underground workings, which could not be entered at the time of examination by Forest Service personnel, and assay certificates, over 30 years old, of samples taken from the inaccessible workings by the claimant's deceased father, showing commercial values in a six-inch vein marked on the map.(Ed.)

ADVERSE PROCEEDING DISMISSED

This proceeding was brought pursuant to section 5 of Public Law 167 (act of July 23, 1955; 69 Stat. 367). Section 4 of this law provides subject to the right of the United States to manage the vegetative and other surface resources thereof (other than mineral deposits subject to location under the mining laws of the United States) provided that the such surface use by the United States shall not endanger or materially interfere with prospecting, mining, or processing operations or uses reasonably incident thereto on such claims. As to claims located prior to July 23, 1955, P. L. 167 prescribes procedure whereby mining claimants may assert that they have the right to a verified statement filed within 150 days after first publication of a notice to this effect relative to lands including their mining claims.

Mr. Belisle filed a verified statement on June 10, 1960, asserting surface rights as to the Black Jack and Black Dragon lode mining claims, and seven additional lode mining claims, located in San Miguel County, Colorado. By decision dated March 19, 1963, the land office manager, Bureau of Land Management, Denver, Colorado, held that, as a result of examinations made by representatives of the United States Forest Service, proceedings pursuant to section 5 (c) of the act of July 23, 1955, are closed as to all claims except the Black Jack and Black Dragon lode claims. Pursuant to request by the United States Forest Service, a hearing was held on June 25, 1965, at Telluride, Colorado, to determine the validity and effectiveness of the two claims in issue. Mr. Rogers M. Robinson, Office of the General Counsel,

United States Department of Agriculture, Denver, Colorado, appeared for the Forest Service, and Mr. Harrison Loesch, attorney, Montrose, Colorado, appeared for the mining claimant. From the evidence presented at the hearing I hereby make the following:

Findings of Fact and Conclusions of Law

The general area on which the claims are located is comprised of underlying pre-Cambrian schist and gneisses with intrusive granite overlain by a series of sphalsic and metazoic sediment. In the particular area where the claims are located there is a group of undivided sediments, overlain by Oligocene age Telluride conglomerate which in turn is overlain by Miocene age San Juan tuff, consisting of andesites and latites, and above this, a Silverton series of volcanics, all of which have been affected and invaded by later intrusions of granite and gabbroic rock. In brief, the claims in question are located in an area where the rocks are highly altered, silicified, and fractured, with vein fillings, some of which contain metallic minerals of good value. The Telluride area has produced many successful mines in past years.

Mr. Warren C. Roberts, a geologist employed by the Forest Service, examined the claims on August 10 and 11, 1960, accompanied by Mr. Belisle, the mining claimant. One sample was taken from the Black Dragon lode, from the discovery work which consists of a shaft driven into the granite porphyry and intersecting a quartz vein. The sample, weighing 3 1/2 pounds, consisted of quartz vein material containing visible galena, marmatite, pyrite, and silicified granite porphyry, and assayed .04 ounce gold, .9 ounce silver, .9 percent lead, .6 percent zinc, and .05 percent copper. The value of the minerals in this sample was $2.86 per ton in 1960, but at today's advanced prices the ore has a value of over $7 per ton.

In 1965, prior to the hearing, Mr. Belisle took a sample from the vein exposed in the discovery pit in the Black Dragon claim at a point 10 feet east of where the 1960 sample was taken. The sample assayed .05 ounce gold, 2.15 ounces silver per ton, 7.35 percent lead, .95 percent zinc, and had a calculated value of $30.41 per ton.

On August 11, 1960, Mr. Roberts took one sample from the Black Jack lode across a quartz stringer exposed at the center of the face of the discovery cut. The sample fragments consisted of vuggy quartz with iron oxide staining, light to moderate in amount, and assayed values of .02 ounce gold, 0.5 percent lead, and a trace of silver, zinc, and copper, with a computed value, at 1960 prices, of $0.01 per ton.

Extensive underground workings have been made on the New Dominion

claim which lies adjacent to the Black Jack. One drift extends into and underneath the Black Jack claim. Mr. Roberts was unable to go into this drift because of bad air as the extremities of the workings are oxygen depleted. However, the mining claimant introduced in evidence a United States Department of the Interior Geological Survey map depicting some mines on the north side of Howard Fork Valley, Colorado. The map, prepared by D. J. Varnes and assistants in 1942, shows that one drift in the New Dominion workings exposes a six-inch vein containing by visible inspection more than 50 percent galena and sphalerite. It is this drift which underlies the Black Jack claim. Mr. Roberts admitted that if such a vein exists that amount of mineral would probably assay about $20 a ton. Mr. Belisle introduced an assay certificate of samples taken by him in 1950 from the Black Jack claim showing a ferric oxide deposit of commercial value. The point of sampling was not shown to Mr. Roberts because Mr. Belisle believed Mr. Roberts would return for re-examination of the two samples taken by him showed low mineral values

Also introduced in evidence were assay certificates dated May 2, 1925, and November 25, 1930, of three samples taken from the workings underlying the Black Jack claim. These samples were taken by the mining claimant's father, now deceased, and the assay reports were of commercial value. The certificates cannot be givenas much evidentiary weight as they might had Mr. Belisle's father been present to testify and be subject to cross-examination, but they still must be considered as valid evidence. They are relevant and, based upon testimony given by the mining claimant, reliable.

Based upon his examination, Mr. Roberts was of the opinion that there was an insufficient showing of minerals to warrant a prudent man in the further expenditure of time and money in an effort to develop a paying mine. Mr. Belisle, an experienced miner, expressed an opposite opinion. Mr. Roberts, however, was basing his opinion primarily on the two samples taken by him in 1960. He could not examine the six-inch veine seen and recorded by Mr. Varnes in the Geologic Survey map introduced as mining claimant's exhibit E, nor did he recall having been shown the assay reports of the samples taken by Mr. Belisle's father.

Mr. Roberts testified that ore having a value of $20 a ton is working proposition. The sample taken from the Black Dragon by Mr. Belisle in 1965 from near the surface contained minerals of considerably higher value than $20 a ton. The sample taken from the Black Jack claim in 1950 showed values of $49.90 per ton. Add to this evidence of the mineral exposed in the workings underneath the Black Jack and it is clear that the mining claimant has successfully refuted the prima facie case presented by the Forest Service.

The "prudent man" rule as expressed in Castle v. Womble, 19 L.D. 455 (1895) is that a valid discovery of mineral has been made where the

evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. In the present case, the evidence shows clearly that this test has been met, indeed exceeded, by the mining claimant.

The adverse proceedings are dismissed.

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed with the Office of Hearing Examiners, Salt Lake City, Utah. If an appeal is taken, there must be strict compliance with the regulations in 43 CFR Part 1840, copy of which, issued as Circular 2137, is enclosed. Also enclosed is Form 1842-1 which summarizes information on taking appeals to the Director.

(sgd.) John R. Rampton
Hearing Examiner